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**“TO SAY WHAT THE LAW IS:”
JOHN MARSHALL AND HIS INFLUENCE
ON THE ORIGINS OF JUDICIAL REVIEW IN AMERICA**

A thesis submitted in partial fulfillment of the
Requirements for the degree of Bachelor of Arts with Honors in
History from the College of William and Mary in Virginia,

By

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“TO SAY WHAT THE LAW IS:” JOHN MARSHALL AND HIS INFLUENCE ON THE ORIGINS OF JUDICIAL REVIEW IN AMERICA

CHAPTER ONE: Introduction

John Marshall should be considered the “Father of the Judiciary” in the same manner that George Washington is hailed as the “Father of the Nation” and James Madison as the “Father of the Constitution.” Few men in American history have had as great an influence on the Courts as he. Not only was Marshall the longest serving chief justice of the Supreme Court of the United States, but the decisions he handed down shaped the early interpretation and implementation of the Constitution. The 1803 case *Marbury v. Madison* is perhaps the most important case he decided, for it expanded the power of the Supreme Court, making it a more equal branch of government. In a mere eleven thousand words, Marshall declared what no justice before him had stated: that it is the role of the courts to interpret the Constitution and determine what is law. But unlike what scholars have argued in the past, Marshall did not simply decide the outcome of *Marbury v. Madison* to further his own political agenda; rather, his decision was influenced by his personal ideology shaped by the events of his life.

The influence of Marshall’s life on his political beliefs stretches back to his service in the early days of the Revolution. As an officer in the Continental army, Marshall first developed his belief in a strong central government, but also acquired leadership experience that would propel him to the forefront of the political stage. His education at the College of William and Mary under Chancellor George Wythe deepened his belief in the separation of powers for government. As a lawyer in Richmond, Marshall rose to prominence through his service as counsel on a number of British debt cases and land

title claims in the Northern Neck of Virginia. His increased notoriety, coupled with his developing sympathies for the protection of property and honoring of contracts, would form him into a leading political and legal figure. During the ratification process for the Constitution, Marshall would emerge as a prominent Federalist, championing an independent judiciary and constitutional supremacy. Finally, as a member of the House of Representatives and then of President John Adams's cabinet, Marshall defended the Adams administration and emerged as a Federalist hero. After the bitter Election of 1800, Marshall would assume the seat of Chief Justice of the Supreme Court of the United States. I submit the argument that examination of selected moments in John Marshall's life reveal the opinion he writes in *Marbury v. Madison* to not just be a great political coup but rather a pragmatic, calculated approach to formally implement the power of judicial review, establish the supremacy of the Constitution, and create a more defined system of checks and balances in the new American government.

Methods

I have divided this treatise into two sections: the first section will examine selected events from Marshall's life to understand how he developed into the Federalist leader he was when he first ascended to the Supreme Court bench and to gain a better understanding of the creation of his political ideology. The second section will examine *Marbury v. Madison* and analyze Marshall's opinion to demonstrate how his life and experiences directly influence his decision. I suggest that selected elements from Marshall's life directly influenced the development of his political ideology and his rise to prominence as a Federalist leader. I lay these elements out in a roughly chronological order, in an attempt to tell a story of how Marshall rises in state and national politics

during the early federal period. To best understand what specific events of Marshall's life directly shape his decision, I introduce the reader first to those elements that I argue bear the most influence on his opinion. Then, after establishing Marshall's ideology through the events that shaped it, I analyze the facts of the 1803 case *Marbury v. Madison* and the opinion Marshall handed down to demonstrate how Marshall decided the case not on political grounds, but rather from a place of pragmatism. Though Marshall's argument does indicate his political motivations, it also reveals a genuine belief in the supremacy of the Constitution, a calculated attempt to formalize the power of judicial review for the Court, and a desire to restrain continued partisan bickering after the Election of 1800.

This treatise is not meant to be an exhaustive biography of the life of John Marshall. Many such works already exist and provide a greater scope of depth and detail than I can provide in this format. Scholars before me have detailed the life of the Chief Justice, many in multi-volume series. The collection of *The Papers of John Marshall* provides a first-hand account of the events and conversations that transpired during his life; his life has additionally been documented in multiple works by scholars throughout the past two hundred years, from Marshall's colleague Associate Justice William Story to twentieth century historian Albert Beveridge to contemporary scholar Jean Edward Smith. Instead, I focus on those specific events that directly impact the decision Marshall formulates in *Marbury v. Madison*.

This work is not meant to be an encompassing legal analysis of Marshall's opinion in *Marbury v. Madison* either. Rather, this work is intended to provide an alternative view to the influences on Marshall in his decision. Where prior legal scholars have held that Marshall staged a political upset by deciding neither completely for the Federalist nor Republican interests and uses faulty logic in his reasoning, I suggest that,

taken in context with the way Marshall viewed the Constitution, his decision was not so much a political statement *against* the Jefferson Administration as it was an argument *in favor* of the Constitution. Early commentators in the nineteenth century focused on the case's finding that Marbury deserved his commission, and scholars later interpreted the decision as a political coup, arguing that Marshall decided the case in the manner in which he did because of his Federalist politics. I do not deny the influence his politics had on his opinion, but I suggest that they are only one factor. Marshall's opinion is best seen through the perspective of his life in its entirety.

Marbury v. Madison is studied for the lasting legacy of judicial review it bestows on the Court. But *Marbury* does more than codify that single power. It formalizes the supremacy of the Constitution, it elevates the judiciary to a level more equal to the other two branches of government, and it is a lesson in moderate, pragmatic politics. It is through a reading of certain elements of John Marshall's life that these lessons and lasting impressions are revealed, and the landmark case *Marbury v. Madison* becomes even more fundamental to the structure of American democracy.

CHAPTER TWO: John Marshall

I: Family and Friends

John Marshall (1755-1835) was the eldest of fifteen children born to Thomas Marshall (1730-1803) and Mary Randolph Keith Marshall (1737-1809). The future Chief Justice credited his father with inspiring him to success.¹ Thomas Marshall came from humble beginnings to become one of the largest landowners in frontier Virginia. Raised in Westmoreland County in the Virginia Tidewater, Thomas built a home in Germantown, in what would become Fauquier County. He was on the first list of magistrates appointed for the county court and also represented the county in the House of Burgesses, a position he would hold almost continually until the outbreak of the Revolution. An officer in the Virginia militia, Thomas Marshall was also a surveyor and agent for Lord Fairfax, proprietor of the “Northern Neck,” a huge grant of land between the Potomac and Rappahannock Rivers that began at the Chesapeake Bay and extended westward almost to the mountains. As was true for his friend, neighbor, and fellow surveyor George Washington, this association with Lord Fairfax provided Thomas with income and social standing. As agent for Lord Fairfax, Marshall not only surveyed his vast land holdings, but had access to his home. Washington and Marshall both took full advantage of the cultural resources there, including most prominently the large Fairfax library.

Like Washington, Thomas Marshall would become further involved in surveying the western frontier. As a result, he would become one of the largest frontier landowners, buying land both in Virginia and Kentucky. Thomas Marshall became one

¹ Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, 1996), 31

of Washington's trusted advisors, paving the way for his son John to build upon that friendship. In 1781, the elder Marshall was appointed as surveyor of the western lands (Kentucky) by the new State of Virginia. With the ratification of the Constitution in 1787 and the formation of the Union, Thomas Marshall was appointed by George Washington as Collector of Revenue for Kentucky. He held that post until 1797.²

On his mother's side, John Marshall was directly related to the powerful Randolph family. Marshall's maternal grandmother, Mary Randolph, was the eldest daughter of Thomas Randolph and Judith Fleming, known as the Tuckahoe Randolphs.³ After an indiscretion with an Irish overseer from a cousin's plantation, Mary fell in love with the Reverend James Keith of Henrico Parish. After another indiscretion with him, Keith was banned from Virginia and exiled to Maryland. However, church authorities later rescinded the exile, allowing Keith to return to Virginia. When Mary came of age, she and Keith were married, a union that resulted in eight children, including John Marshall's mother, Mary Randolph Keith. Controversy later arose as to whether the marriage was legitimate. Perhaps because of this scandal, Marshall did not often reference his connections to the influential Virginia Randolphs. It is also through Marshall's maternal lineage that he was related to Thomas Jefferson (Thomas Randolph's brother Isham was Thomas Jefferson's grandfather.) Although they were blood relatives, John Marshall and Thomas Jefferson would become bitter political enemies.

John Marshall's life was heavily influenced by his father's connections to Lord Fairfax. Not only was he exposed to intellectual and cultural resources of the Fairfax estate, but as a lawyer in Richmond after the Revolution, Marshall would often represent Fairfax interests.

² *Ibid.*, 31

³ *Ibid.*, 23

II: Marshall the Soldier

Perhaps the most influential experience in John Marshall's life was that of being a soldier in the Continental army during the American Revolution. It was then that his leadership style truly flourished, his negotiation abilities developed, and most importantly, his belief in a strong central government took root.

Marshall enlisted in July 1775 in the local militia, and was made first lieutenant in the Fauquier rifles at the age of twenty. This division was a branch of the Culpeper Battalion, a minuteman unit that served in Williamsburg during the winter of 1775. As a member of this division, Marshall saw action at the Battle of Great Bridge on December 9, 1775. In the summer of 1776, the Virginia minutemen disbanded, but Fauquier County was allowed to recruit men to serve. Marshall was again commissioned as a first lieutenant, this time in the new Continental Army. Marshall's company was assigned to the command of Colonel Daniel Morgan in the 11th Virginia Regiment. Most of Marshall's army service from 1776 through 1780 would be spent under Morgan's command. In April and May of 1777 Marshall had the opportunity to work closely with Morgan, serving as his regimental adjutant. In September 1777, he again saw action in the Battle of Brandywine. But it was the hardships of Valley Forge during the winter of 1777-1778 that set Marshall on the path to becoming a Federalist after the war.⁴

Now a 22-year old lieutenant, Marshall quickly gained the respect of both his fellow officers and the men who served under him at Valley Forge. Remarkd one soldier, "He was an excellent companion, and idolized by the soldiers and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote."⁵ In

⁴ *Ibid.*, 45

⁵ Joseph Story, "Chief Justice John Marshall's Public Life and Services," *North American Review* 26 (January 1828): 8

letters written home to his family during the encampment at Valley Forge (and at other points during the war), Marshall rarely mentioned personal hardship.⁶ After the June 28, 1778 Battle of Monmouth, Marshall was promoted to captain.

In December of 1778, Marshall went home on furlough. This trip would prove to have a tremendous impact on him. At home, he witnessed first-hand the devastation and sacrifice that the war exacted from private citizens. He watched as his mother struggled to provide food for him and the French officers who had accompanied; he witnessed the extreme scarcity of foodstuffs and other essential supplies.⁷ He returned to the army in early May 1779, where he served as captain until his discharge in February 1781.

Marshall's service in the army was one of the most important events of his life. When writing his biography of George Washington, his descriptions of the war were marked with a deep humanity and respect for the sufferings of war, not a bitterness that pervaded so many other soldiers.⁸ Marshall's role in the war also propelled him into society. His relationship with Washington, though begun by his father's pre-friendship with the general, was strengthened by his service, especially his stay at Valley Forge. Marshall was of the younger generation of Founders; he was not a signer of the Declaration or at the head of that political movement. Instead, his public career was born on the battlefield and in winter quarters. Like other of Washington's young officers, Marshall built a post-war career upon his experience as a soldier.

Perhaps the longest lasting influence that Marshall's military service had on him was his belief in the need for a strong central government, one that could effectively

⁶ Smith, *John Marshall*, 63

⁷ *Ibid.*, 67

⁸ *Ibid.*, 69

control and supply an army. In the post-war years he would champion a governmental structure that would have the power and resources to support the military and thus the country. It is also arguable that during the Revolution that Marshall's patriotism began to develop into a national perspective in which the new United States superseded Virginia in importance.

III: Days at William & Mary

Marshall received much of his early education at home, supervised by his father, who himself exhibited a passion for learning. Fortunately, the Marshalls had access to the library at the Fairfax estate. Marshall read the classics—Livy, Horace, Pope, Dryden, Milton, and Shakespeare—gaining the foundation for a legal education. At the age of twelve, he transcribed Alexander Pope's *Essay on Man*, and learned most of it by heart.⁹ In Pope's work, Marshall was exposed to writings on the nature of man and the alliance between nature and reason. The profound influence these writings had on Marshall can be seen throughout his legal work, where he often relies on logic and reason for his arguments. Additionally, the style of Pope's writing influenced Marshall, who paid close attention to the manner in which Pope styled sentences and the manner of Pope's phrasing.¹⁰

When he was fourteen, Marshall attended the Washington Parish academy, run by the Reverend Archibald Campbell. Both Thomas Marshall and George Washington had attended the academy as youths, and John Marshall was there a classmate with James Monroe. Marshall and Monroe would later serve together as officers in the Continental

⁹ Max Lerner, "John Marshall and the Campaign of History," *Columbia Law Review*, Vol. 39, No. 3 (March 1999): 397

¹⁰ Smith, *John Marshall*, 34

Army, would attend law lectures at William and Mary together, and would serve together on the Virginia Executive Council¹¹. Despite these common experiences, they would often find themselves in political opposition to each other, as Marshall would later take the lead of the Federalist Party, and Monroe, that of the Republican Party.

As the American Revolution began to draw to a close, Marshall turned his sights towards a profession of law. He enrolled at William and Mary on May 1, 1780, and became one of forty young men who attended lectures on the law given by Chancellor George Wythe. While at William and Mary, Marshall prepared the standard notebook of legal terms and arguments that students of law prepared. The detail and thoroughness of Marshall's notebook displays the time and care he spent on his studies. Indeed, Marshall would keep this notebook for the rest of his life, and refer to it often during his legal career.¹² The notebook includes definitions of government and notes on the proper structure of arguments. It reveals the thought patterns of Marshall's logical mind; how he thought through issues and lines of reasoning, and the way in which he was trained to prepare and construct arguments. His description under "Actions in General" is particularly illustrative:

It is clear that for every injury a man shall have an action & for every right he has a remedy. Where a person has several remedies he may chuse [sic] which he pleases but in this he must follow the rules of that society of which he is a member, for tho' [sic] a man has a right & is barred by the statute of limitations yet he can have no remedy.¹³

Not only does this argument show Marshall's approach to logic and argument structure, but the description of a person's right to remedy is indicative of how he viewed the

¹¹ Gary Hart, *James Monroe* (New York: Henry Holt and Company, 2005), 12

¹² Smith, *John Marshall*, 81

¹³ John Marshall, Notebook of Legal Terms, May 1780, John Marshall Papers, Earl Gregg Swem Library of the College of William and Mary, Williamsburg, VA, 9

courts. This idea of a right to remedy provided by the court would play a central role in *Marbury v. Madison*.

It is also at this time that Marshall read the work of influential legal scholars, including most notably Montesquieu and Hume. In Montesquieu's *The Spirit of the Laws*, Marshall was exposed to the doctrine of separation of powers, one that would influence the Framers of the Constitution. The ideology of separation of powers sought to limit legislative authority; this limit was made possible by an independent judiciary. Chancellor Wythe embraced this philosophy, and Marshall agreed.¹⁴ In David Hume's *Treatise of Human Nature*, Marshall found a reinforcing ideology for his skepticism about natural law and *a priori* principles. Hume, like Pope, drew upon the value of experience, a principle that Wythe further impressed upon his students. Hume built upon the view that "stable property ownership was the foundation of a stable society."¹⁵ To Marshall, this validated his deep belief that property was the basis for society and the ruling class. His familiarity with the Fairfax, Washington, and Randolph families no doubt prepared the way for these views.

Marshall's experiences at William and Mary were influential in other ways beyond academic. While a student, he was a member of Phi Beta Kappa fraternity. Some of his brothers there would go on to be leaders in the new American government. Marshall's classmates included Bushrod Washington, who would serve on the Supreme Court with Marshall, and Spencer Roane, who would serve in the Virginia House of Delegates. Like the relationships he built as a soldier, Marshall developed friendships—as well as antagonistic relationships—with men he would serve and work with throughout his life. After he finished Chancellor George Wythe's lecture series, Marshall secured his license

¹⁴ Smith, *John Marshall*, 79

¹⁵ *Ibid.*, 79

to practice law in Richmond in 1780. On August 28, 1780, he was then admitted to the bar in Fauquier County.¹⁶ After leaving the army in 1781, Marshall alternated his time between his home at Oak Hill Plantation in Prince William County and the new capital at Richmond. In 1781, Marshall married Mary Willis (Polly) Ambler, a daughter of the affluent Ambler family who had moved to Richmond from York County after the War. Through his connection to the Amblers, Marshall gained access to the highest levels of Virginia society and the politicians in the new state capital. Marshall now stood poised to become a major member of the Richmond bar.

IV: Practicing Law; Seeking an Independent Judiciary

Even marriage to a daughter of so prominent a family as the Amblers could not guarantee John Marshall's success as a Richmond lawyer. Nor could his family's blood connections and social ties to several other first-tier families, his service as one of Washington's young officers during the War for Independence, or the contacts he had made in the army and at William and Mary insure success. Those and other factors merely set the stage. As it turned out, Marshall's spectacular career as a lawyer owed much to the "Revolutionary Settlement" that followed the successful struggle for independence from Great Britain. For Marshall, the primary means for attaining wealth and celebrity during those years were cases involving the recovery of debts and cases dealing with American claims to land.

In 1777, the Virginia General Assembly had passed a Sequestration Law, under which citizens could pay all or part of the debts they owed to British creditors into a

¹⁶ Albert J. Beveridge, *Frontiersman, Soldier, Lawmaker*, vol. 1 of *The Life of John Marshall*, (New York: Houghton Mifflin Company, 1916), 164

state loan offices.¹⁷ Virginians later would contend that payments made to that state loan office discharged their debts to British creditors. Virginians also claimed exemption from British debts under a 1782 act that stated no debt due to a British creditor would be recoverable in the state of Virginia unless the debt was assigned before 1777 (that is to say, before the Sequestration Act.) However, the 1783 Treaty of Paris included a condition whereby British subjects would be allowed to recover debts from Americans in American courts.¹⁸ Would these cases be tried in the state courts of the state in which the citizen resided? Or, because they were debts addressed by the federal Treaty of Paris, would they be heard in the new federal district courts? As these courts began to hear debt cases, John Marshall, now a young lawyer in Virginia's new capital in Richmond, became a star and the most sought after lawyer in Virginia by 1790.¹⁹

The Virginia courts were closed to cases during 1780 and 1781. After the Treaty of Paris of 1783, however, they were not only open, but their dockets became clogged with cases concerning American debts to British creditors and also questions over claims to land in the newly independent United States. In 1782, Thomas Marshall was appointed to the state survey office for the Kentucky Territory. John Marshall served as the intermediary between his father's office and investors.²⁰ His experience with land investors and survey claims brought many clients who had dealings in land claims to his practice.

Marshall also benefited from his new father-in-law's prominent status in Virginia. In 1782, Jaquelin Ambler served as the state treasurer. Marshall himself was elected to the

¹⁷ Charles F. Hobson, "The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797," *The Virginia Magazine of History and Biography*, Vol. 92, No. 2 (April 1984): 177

¹⁸ *Ibid.*, 179

¹⁹ *Ibid.*, 183

²⁰ Smith, *John Marshall*, 90

Council of State in November 1782. As a result, clients who had business with the state would come to Marshall, increasing his law practice in the meantime.

While in Richmond, Marshall benefited from the presence of other prominent Virginia lawyers, especially John Wickham and Edmund Randolph. Wickham was a prominent attorney in Virginia and one that would frequently serve as opposing council to cases Marshall would argue. Wickham and Marshall participated in many of the same social clubs and events; their houses (both of which survived the great fire of 1865) were located only a few blocks away from each other, thus facilitating their entertaining of guests and clients, often from the same social pool. But Wickham and Marshall's houses are physical manifestations of their very different personalities. Where Wickham used his wealth to impress his guests and illustrate his power and influence, Marshall's house reflected his pragmatism. Marshall's Richmond home was solid and well built, like his reputation. He did not live cheaply: his furnishings were of the highest quality. But he was not ostentatious. Visitors to the home of the future chief justice left impressed by Marshall's intelligence and rationality.²¹

Marshall was perhaps most influenced by Edmund Randolph, the attorney general, (briefly) secretary of state, and Governor of Virginia in 1786. A cousin on his mother's side, Randolph assisted Marshall in the early stages of his legal career and would ultimately expand Marshall's client base enough to make him one of the most prominent lawyers in Virginia. When Marshall first moved to Richmond, he did not have chambers of his own; Randolph offered Marshall the use of his chambers during the beginning days of his practice. Randolph had risen to prominence as an attorney and received many of his clients from his—and Marshall's—cousin Thomas Jefferson when Jefferson

²¹ Visit to John Marshall House, Richmond, VA (September 25, 2009)

shifted his primary focus to politics in 1774. When Randolph became governor in 1786, he handed his clients over to Marshall. Ironically, Jefferson's legal practice became Marshall's.²²

Marshall would continue to practice law until his appointment as chief justice, all the while participating in state and national politics. In 1783, a case would come before the council of state when Marshall was a sitting member that would reveal how the future chief justice felt about constitutional supremacy. Though he was not a participating lawyer in the case, Marshall's opinion in what became known as the Posey Affair offered a preview of his later legal reasoning in *Marbury v. Madison*.

A case entitled *Commonwealth v. Canton* came before the Virginia state court a mere three months before the Posey Affair. This case involved a conflict between the Treason Act, passed by the Virginia legislature in 1776, and the Virginia state constitution. A complicated case, the basic conflict arose from the fact that the Treason Act gave the power to pardon a person from treason to the legislature, whereas the constitution gave that power to the governor. As attorney general, Edmund Randolph made the case for constitutional supremacy. He argued that the constitution represents the will of the people and should therefore be enforced over the will of the legislature. This argument in favor of constitutional supremacy over legislative acts was not lost on Marshall, who was one of the many interested attorneys who witnessed the oral arguments.²³

In 1783, Virginia Governor Benjamin Harrison presented the council of state with an allegation of misdeeds against a New Kent County magistrate, John Price Posey. Marshall was a sitting member of the council at the time. To Marshall, the investigation raised questions of judicial independence. Marshall's belief in the separation of powers

²² Smith, *John Marshall*, 90

²³ *Ibid.*, 94

argument, as espoused by Montesquieu, led him to strongly favor an independent judiciary that was free from executive interference. To the future defender of the judicial branch, the executive's interference in the judiciary was inappropriate, and could be construed as the executive attempting to unfairly influence the decisions of the court. *Commonwealth v. Canton*, and the argument for constitutional supremacy, was still fresh in the minds of the members of council. Marshall seized the opportunity, in the recorded minutes of the council meeting, to declare unconstitutional the act of the legislature authorizing the council to proceed in the investigation. This was the first recorded instance in the history of the United States that an act of the legislature was struck down because it violated a constitution.²⁴

In 1786, Marshall would argue his first major case before the Virginia court of appeals. *Hite v. Fairfax* was a case involving property rights and contract law, not constitutional supremacy. In 1735, Virginia Governor William Gooch had issued a patent to Jost Hite for 54,000 acres of land. The patent conflicted with an earlier royal grant that was given to Lord Fairfax. In 1741, the British Privy Council granted rights to the land to Lord Fairfax. Hite presented a set of surveys to Fairfax, who had agreed to issue patents to Hite, but Fairfax then declined to issue the patent on the grounds that Hite's claim was to inaccessible lands. In 1749, Hite sued to secure a title to the land. In 1769, the general court ruled in favor of Hite. They established a commission of seven who would examine Hite's survey and determine proper ownership. The commission of seven included Thomas Marshall. In 1771, the commission report was filed, and the government issued a final decree and both sides filed an appeal to Britain's Privy Council. The outbreak of the American Revolution led to a break in the litigation, but

²⁴ *Ibid.*, 95

the case was placed again on the docket of the Virginia court of appeals in 1780. The case finally came before the court until April 29, 1786.²⁵

John Marshall was council for the Fairfax estate along with attorney Jerman Baker. Despite having inherited Randolph's cliental, Marshall argued against Edmund Randolph who served as council for Hite alongside attorney John Taylor of Caroline. The oral arguments stretched on for six days. Randolph, arguing for Hite, stressed the equity claim rather than the rules of property, stating that ruling in favor of Hite would create a level of equality between rich and poor. Baker, in defense of the Fairfax estate, claimed that Hite was trespassing, and that his claim to the land came from an unauthorized 1735 act of the defunct colonial government. Hite's claim was no longer valid under the new American government. Taylor, for Hite, took a different approach. He questioned the legitimacy of the original royal grant given to Fairfax. The grant, he claimed, was made and confirmed by Charles II and James II when neither of them were actually on the throne, and therefore was not a legitimate grant. The final word lay with Marshall. He argued that a reasonable man would have been prompted to have searched into the title, which would have served notice to the purchaser.²⁶ Unlike the attorneys before him who relied on emotional appeals to the gap between rich and poor or the technicalities of whether a king had the appropriate authority to award a land grant, Marshall invoked Coke and Blackstone to provide a basis in legal theory as to why Fairfax had legal rights to the land, regardless of political passions. Ultimately, the Court of Appeals found in favor of Hite, but they did also stipulated that Marshall's argument had merit and that the Fairfax estate could convey lands to purchasers.²⁷

²⁵ *Ibid.*, 105

²⁶ *Ibid.*, 106

²⁷ Hite v. Fairfax

The results of *Hite v. Fairfax* were very significant, for Marshall's argument took a significant step towards securing property titles for Americans in the Northern Neck. The case also led to a tremendous amount of litigation, with many clients seeking out Marshall specifically. The dramatic increase in revenue not only allowed Marshall to better support his family, but also allowed him to increasingly participate in politics. His participation in such a prominent case also cemented his position as a leading Richmond attorney.²⁸ It is interesting to note that Marshall later purchased lands from the Fairfax estate himself. Marshall's arguments do not appear to be colored by any personal interest he may have had in the land at the time, and it could be the case that Marshall's interest in the land occurred after he argued the case. But more than just promoting his reputation, *Hite v. Fairfax* more permanently developed Marshall's support for private property and what would become his overall judicial philosophy. His experience with this case in particular influenced how he would later interpret the Contract Clause of the Constitution during his tenure as chief justice.²⁹

In addition to taking on cases that dealt with claims to the Fairfax estate, Marshall also became a prominent lawyer in the British debt cases. Virginia was one of the states with the highest debt to British merchants, and as a result, witnessed an extensive amount of litigation addressing British debt recovery claims.³⁰ Marshall, in his personal belief supporting honoring terms of a legitimate contract, saw the failure to pay debts as giving Britain too much power over the newly independent United States. Though he was often retained as council for Virginia debtors, Marshall was firmly on the side of

²⁸ Smith, *John Marshal*, 107

²⁹ Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law*, (Lawrence: University Press of Kansas, 1996), 74

³⁰ Hobson, "The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790-1797," 177

contract compliance.³¹ His deep involvement with the British debt cases would definitively shape the way he would interpret the Contract Clause of the Constitution.

After the ratification of the Constitution, Marshall continued with his law practice, but now there was a new court structure with which lawyers had to contend. In the 1790 case *Bracken v. College of William and Mary*, Marshall defended his alma mater against the threat of government control. In this case, Marshall argued for the independence of private educational institutions against interference by the government. This case would serve as the basis on which he would later decide the 1819 case *Trustees of Dartmouth College v. Woodward*.³² The 1793 case, *Ware v. Hylton*, was yet another British debt case. This case was unique, however, in that it was the only case Marshall ever argued before the Supreme Court over which he would later preside as Chief Justice. *Ware* was used as a test case for the supremacy of the Constitution: it questioned whether the federal Treaty of Paris was superior to a Virginia state law regarding the collection of British debts. Marshall partnered with Patrick Henry to represent the defense: Henry employed his theatrical oratory skills and Marshall brought his superior legal reasoning.³³

Marshall believed strongly in the right to private property and in upholding the terms of a contract. He also believed firmly in a strong national government, one that would protect private property rights and would have the resources and authority to support the military. In order to protect those rights to private property and to support the strong national government, Marshall placed his faith in the supremacy of the Constitution. But in order to fully uphold the Constitution, Marshall argued the need of the courts to have the power of judicial review. The courts must be the branch to

³¹ Smith, *John Marshall*, 162

³² Florian Bartosic, "With John Marshall From William and Mary to Dartmouth College," *William and Mary Law Review*, Vol. 7 (1966): 265

³³ *Ware v. Hylton*

interpret statutory law and insure that it did not violate the terms of the Constitution. And, in keeping with the theory of separation of powers to which Marshall subscribed, an independent judiciary was the bedrock of maintaining constitutional supremacy, thus private property rights and the national government.

While Marshall was establishing himself as one of the most prominent lawyers in Virginia, he was simultaneously pursuing a political career.³⁴ In 1782, Marshall was first elected to the Virginia House of Delegates. During this time, he served with leading Virginia figures such as Patrick Henry, George Mason, Richard Henry Lee, John Tyler, and James Monroe. Monroe, like Marshall was also serving his first term.³⁵ After serving only one term in the House of Delegates, Marshall was elected to the council of state at the age of 27 (Monroe, too, was elected to the council the same year after only serving one year in the House.) Though both Marshall and Monroe were young, it was not unprecedented to have young members sit on the council of state.³⁶ It was during this time on the council of state that Marshall articulated the opinion for which he most remembered—the supremacy of the constitution—on the Posey Affair.

Marshall was reelected to the House of Delegates in 1787 and quickly moved to correct the issue that had been at stake during the Posey affair. He introduced legislation that would repeal the original statute that gave authority to the council to investigate the conduct of judges. Demonstrating the influence both of Montesquieu's political theory established in his *The Spirit of the Laws* and the instruction Marshall received as a student at William and Mary under Chancellor George Wythe, Marshall asserted that the power

³⁴ Smith, *John Marshall*, 164

³⁵ *Ibid.*, 87

³⁶ *Ibid.*, 92

the council held to investigate the conduct of judges violated the independence of the judiciary.³⁷

V: Struggle over the Constitution

Marshall had already laid a foundation for his opinion on the supremacy of the constitution while a member of the Virginia House of Delegates. It was, however, during the fight for ratification of the United States Constitution that he would emerge as both a leader of the Federalist Party and as a staunch defender of the government under the Constitution, especially the judicial branch. After the Constitutional Convention in Philadelphia concluded and a draft of the document was produced, the individual states held their own ratification conventions. Despite the provision that nine of thirteen states were needed to ratify the document for it to become effective, it was widely acknowledged that Virginia, for political reasons, needed to be one of those states to ratify. Virginia was one of the most politically powerful states in the Union, possessing both a large population and substantial economy. While technically a Southern state, Virginia is geographically towards the northern section of the Southern region; as such, it helped create a bridge between the mid-Atlantic and Southern states.

Marshall entered the ratification convention with his mind already made up to defend the Constitution. He already had a strong devotion to national unity, rising primarily from his experiences in the military.³⁸ For Marshall, the key to a successful democracy—and independence in general—was an independent judiciary. It is in the fight for ratification that Marshall, who would become the leading defender of the judiciary, made apparent his support of an independent system of courts.

³⁷ *Ibid.*, 96-97

³⁸ *Ibid.*, 115

Before the questions of the judiciary and the constitution itself could even be debated, a convention had to be called. And it was none other than Marshall who proposed it. In October 1787, the House of Delegates passed Marshall's resolution for a ratification convention.³⁹ But the Constitution was in trouble from the beginning in Virginia. Partisan lines were drawn quickly and firmly. Many of the leading Anti-Federalists, who argued against the Constitution both at the Philadelphia convention and during the ratification process, were leading Virginians. They feared that the document produced in Philadelphia took too much power from the states and gave it to a central government that would become oppressive and squash individual freedoms, much like the royal government they had just fought so hard against.

Patrick Henry led the Anti-Federalists in protesting the Constitution at the Virginia state convention. On June 5 and 7, 1788, Henry launched into his series of speeches against the Constitution. His speeches were based on the emotional appeal to the fear that so many Americans held: that the Constitution would create a central government so strong it would be as oppressive as the monarchy against which they had just rebelled.

Appealing to every man in the room, Henry claimed

here is a revolution as radical as that which separated us from Great Britain. It is as radical, if in this transition our rights and privileges are endangered, and the sovereignty of the States be relinquished: And cannot we plainly see, that this is actually the case...This acquisition [of the Constitution] will trample on your fallen liberty: Let my beloved Americans guard against that fatal lethargy that has pervaded the universe: Have we the means of resisting disciplined armies, when our only defence, the militia is put into the hands of Congress...This Constitution is said to have beautiful features; but when I come to examine these features, Sir, they appear to me horribly frightful. Among other deformities, it has an awful squinting; it squints towards monarchy: And does not this raise indignation in the breast of every American?⁴⁰

³⁹ *Ibid.*, 117

⁴⁰ Patrick Henry, Speech before Virginia Ratifying Convention on June 5 and 7, 1788, in *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York: Signet Classic, 1986), 199-213

Henry spoke early in the Convention, setting the tone against ratification. He argued against the very provision that Marshall felt so justified a strong central government: the ability to efficiently regulate and supply an army.

The Federalists were well aware of their opposition and the battle that lay before them. The series of arguments now known as *The Federalist Papers* were written in defense of the Constitution in New York, but Virginians were reading them as well. James Madison, the “Father of the Constitution” and a Virginian himself, was one of authors of *The Federalist Papers* and the Virginia Federalists were well armed with the arguments in favor of the proposed constitution.⁴¹

The debates over the Constitution continued back and forth for days, with prominent leaders speaking on both sides. On Tuesday, June 10, the debate between Marshall and his childhood friend Monroe began. Monroe addressed the convention first, arguing against ratification in a speech filled with lofty metaphors about Ancient Greece. Marshall addressed the delegates next. Marshall relied not on historical metaphors like Monroe or fiery, emotional appeals like Henry, but rather on his carefully honed legal skills. He delivered an argument in favor of ratification that rested on logic and reason and, as a result, resonated with the many lawyers present at the Convention.⁴²

The Monroe-Marshall debates may not have been the deciding moment at the Convention, but they are important for two reasons. First, they demonstrate Marshall’s legal prowess. His carefully reasoned arguments would become his trademark. At the Convention, he established himself as a legal force to be reckoned with and a voice for the Federalist Party. Second, the debates demonstrate the first real division between

⁴¹ Smith, *John Marshall*, 130

⁴² *Ibid.*, 131

Marshall and Monroe. They had grown up together and had similar experiences serving in the military, studying at William and Mary, sitting in the House of Delegates, and as members of the Council of State. But now their paths would diverge. Monroe would become an active player in the Anti-Federalists (later the Republican) party, and Marshall would be a leader in the Federalist. The differences between Marshall and Monroe help to explain why, on a larger scale, Marshall would differ politically from most of his fellow Virginians.

Marshall distinguished himself at another point during the Convention: the debate over Article III—the Judiciary Article. Marshall had already signified himself as a strong defender of an independent judiciary in the Posey Affair. Now he would defend the branch he would one day lead. Mason and Henry both argued that the state courts should be enough; that a federal judiciary would take power away from the states and trample state and individual rights. When Marshall responded to Mason and Henry, he laid out another carefully reasoned argument. Marshall called the judiciary the defender of the Constitution and of individual liberty. He chided the Anti-Federalists for claiming the Court would become a tool of oppressive government.⁴³ In a moment that almost foreshadowed his future decision in *Marbury v. Madison*, Marshall explained that because Congressional powers were delegated by the Constitution, “If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.”⁴⁴ By arguing

⁴³ *Ibid.*, 138

⁴⁴ John Marshall, Speech before the Virginia Ratification Convention, June 18, 1788, in *The Marshall Papers*, vol I, ed. Charles F. Hobson, (Chapel Hill: The University of North Carolina Press, 1990), 277

the unnamed power of judicial review, Marshall demonstrated how an independent judiciary was the bulwark of a democracy and the guardian of personal freedom.

On Wednesday, June 25, 1788, after several rounds of voting, Virginia became the tenth state to ratify the Constitution. Although the Constitution had technically gone into effect with the ratification by New Hampshire (the ninth and last state needed to officially adopt the Constitution), Virginia's ratification sent a strong political message that the Constitution would be recognized as the supreme law of the land.

VI: Politics in the New Nation

Marshall emerged from the Convention with a new reputation. He was now not only an accomplished lawyer, but a staunch defender of the judiciary and a leader in the Federalist Party. In 1789, Marshall was appointed US Attorney General for Virginia under the Washington administration. He turned down the position, however, because his law practice was doing exceedingly well. In the summer of 1794, he was appointed as Virginia's acting attorney general during James Innes's absence from the state.⁴⁵

In 1796, Marshall was reelected to the House of Delegates. During this term the Fairfax cases were still before the courts. Marshall himself filed suit on behalf of the estate, touching off litigation that would ultimately result in the 1816 Supreme Court case *Martin v. Hunter's Lessee*, from which Marshall, as sitting chief justice, would recuse himself.⁴⁶ Also in 1796, Marshall was again offered a post by the Washington administration, as Minister to France. Marshall declined the nomination on the grounds of not wishing to be away from Polly and his family for such an extended period of time

⁴⁵ Smith, *John Marshall*, 163

⁴⁶ *Martin v. Hunter's Lessee*

(the post would ultimately go to Charles Cotesworth Pinckney).⁴⁷ Despite refusing the position as Minister to France, Marshall would be named as part of the delegation that was sent to France in 1797 under the Adams administration to negotiate better relations with the Revolutionary French government after the controversial Jay's Treaty with Britain. It would be this trip that would end in the legendary XYZ Affair.

VII: The XYZ Affair

America in the early federal period was struggling not only with domestic issues, but also to create a reputation of respect among foreign nations. The mission to France on which Marshall served was not the first attempt to improve the tenuous Franco-American relations. During the American War for Independence, the French and Americans signed the Treaty of 1778, pledging French money and French military support for the American Cause. Historically an enemy of England, France viewed the revolt of Great Britain's North American colonies as an opportunity to weaken their ancient opponent and possibly gain a future ally against England. Despite the assistance the French gave towards the American victory, the United States was not quick to support the French Revolution when in 1789. Though the French verbally espoused many of the same ideals as the American Revolution, many Americans were unsettled by the violence, including especially the killing of the monarch.⁴⁸

American politics during the Washington and Adams administrations took an increasingly anti-French tone. By the time John Adams assumed the office of the presidency, hundreds of American ships had been commandeered by French privateers

⁴⁷ George Washington to John Marshall, Mount Vernon, August 10, 1796, in *The Papers of John Marshall*, Vol. III, 39

⁴⁸ Marshall Smelser, "The Jacobin Phrenzy: Federalism and the Menace of Liberty, Equality, and Fraternity," *The Review of Politics*, Vol. 13, No. 4 (1951): 472

in the West Indies and elsewhere, and the problem was only escalating.⁴⁹ Domestically, Federalists and Republicans were split over how to proceed with French relations: Federalists looked for a way to sever the relationship, while Republicans feared that the Federalist administration would succeed in ending the French alliance. Towards the end of his administration, Washington had moved towards a more hostile position towards the French; his successor Adams continued that trend. On May 15, 1797, Adams convened a special session of Congress to address the increased French hostilities on the open seas. In his address, Adams described the French demands for a new American minister to be sent to France and French indignities towards Americans. He called for the nation to defend itself, saying “[s]uch attempts ought to be repelled with a decision which shall convince France and the world that we are not a degraded people, humiliated under a colonial spirit of fear and sense of inferiority, fitted to be the miserable instruments of foreign influence, and regardless of national honor, character, and interest.”⁵⁰

In 1797, President John Adams appointed three emissaries to France—Charles Cotesworth Pinckney from South Carolina (already been serving as American envoy in France), Elbridge Gerry from Massachusetts, and John Marshall—to sail to France to negotiate cessation of maritime hostilities with the new French Directory. Pinckney had arrived in France much earlier after his appointment as Minister to France. Marshall sailed to the Netherlands to await the arrival of Gerry, arriving in The Hague on August

⁴⁹ William Stinchcombe, “The Diplomacy of the XYZ Affair,” *The William and Mary Quarterly*, Vol. 34, No. 4 (Oct. 1977): 590

⁵⁰ John Adams, Speech to Congress on May 16, 1797 regarding the XYZ Affair. <http://www.let.rug.nl/usa/P/ja2/speeches/jaxyz.htm> (accessed April 14, 2010)

29, 1797. Pinckney traveled to meet Marshall in Amsterdam, and the two spent early September waiting for Gerry to arrive.⁵¹

Charles Maurice de Talleyrand-Périgord, Bishop of Autun, or simply Talleyrand as he is more commonly referred, was an influential figure in both the French Directory and the negotiations of the XYZ Affair. Talleyrand was intimately familiar with the American political landscape as a direct result of his time spent in America as an émigré. In 1792, Talleyrand first fled from France to England, then sailed to the United States in February 1794⁵². He then spent the next two years living in the United States, where he became familiar with the political climate of the day, as well as engaging in land speculation and befriending many of the leading political figures, including Secretary of War General Henry Knox⁵³. Talleyrand returned to France in 1796, after the end of the Terror. Upon his return, he was elected to the Institut National, where he produced two papers on North America and its relations with Britain. In these papers, he argued that the United States and Britain were naturally linked by culture, language, and finances, and stated that if the United States were to end its policy of neutrality it would more than likely form an alliance with Great Britain⁵⁴. After writing the papers on North America, Talleyrand succeeded Charles Delacroix as the foreign minister in 1797⁵⁵.

Talleyrand recognized that the French relied upon their commercial interests from their colonial possessions in the French West Indies. An all out war with the Americans might cut off trade and naval access to their colonial possessions, thus further damaging a French economy that was experiencing rampant inflation. The French

⁵¹ John Marshall to Timothy Pickering, September 9, 1797, *The Papers of John Marshall*, Vol. III, 132

⁵² Richard Munthe Brace "Talleyrand in New England: Reality and Legend," *The New England Quarterly* Vol. 16, No. 3 (1943): 397

⁵³ *Ibid.*, 398-399.

⁵⁴ Smith, *John Marshall*, 194-195

⁵⁵ William Stinchcombe, "Talleyrand and the American Negotiations of 1797-1798," *The Journal of American History*, Vol. 62, No. 3, (1975) 577.

“could see no political goal that would justify war with the United States. If war did break out...supplies to the French West Indian colonies would be cut off and the United States would probably enter into a virtual alliance with Great Britain.”⁵⁶ Another point that Talleyrand brought up in his reports, and the issue he would then open negotiations with, was that of American President John Adams’ May 16, 1797 speech to Congress, which the French found offensive.⁵⁷

After submitting his papers to the Directory, Talleyrand returned to the American envoys. As a preliminary to negotiations, Talleyrand demanded an explanation for President Adams’ speech. The Americans refused to provide the explanation. Marshall recorded in the Paris Journal that the envoys “read the Presidents speech & were of the opinion that explanations could only be demanded on the conclusion which states his determination to adhere to the system already adopted & to the engagements already made.”⁵⁸ The following events are typically those that are referred to as the XYZ affair. After the Americans’ refusal to explain the Adams speech, Talleyrand then left the envoy. Some days later, an intermediary by the name of Jean Conrad Hottinguer visited the Americans. Hottinguer was to be referred to as “X” in the American correspondence sent home. Hottinguer explained that members of the Directory were upset about President Adams’ speech and wanted to be calmed down. He then stated that negotiations would not begin until the Americans had paid for damages against the French government, given a substantial loan to the French government, and provided an “additional *pot de vin* of £50,000 to Talleyrand—a bribe to soothe the thirsty throat of

⁵⁶ *Ibid.*, 581

⁵⁷ Smith, *John Marshall*, 206

⁵⁸ John Marshall, “Paris Journal: Oct. 15, 1797,” in *The Papers of John Marshall*, Vol. III ed. William C. Stinchcombe, Charles T. Cullen, and Leslie Tobias, (Chapel Hill: University of North Carolina Press), 162

government.”⁵⁹ This was the initial bribe demanded that so outraged the Americans. Marshall recorded the event in his Paris Journal, saying “M. Horttinguer [sic] ...said he... it is money; it is expected that you will offer money: we said we had spoken to that point very explicitly: we had given an answer...it is no, no, not a six pence.”⁶⁰ A second man, Pierre Bellamy, Talleyrand’s personal banker, came to visit the emissaries. He would become “Y” in the Americans’ correspondence. He repeated the demands. A third intermediary for Talleyrand later visited the Americans, Lucien Hauteval. Hauteval would be referred to as “Z” in the Americans’ correspondence. He also explained that the loan and money for Talleyrand were a prerequisite to doing business with the Directory. The Americans refused the demands, and wrote a lengthy statement to Talleyrand in January 1798, reemphasizing American neutrality and of American claims against France.⁶¹ The French request for bribes outraged the Americans; it was seen as both disrespectful of American sovereignty and immoral.

While Marshall was in France, he had witnessed the chaos that became the trademark of the French Revolution. Initially he refrained from judging a people striving for liberty and democracy, but his mind changed as he became exposed to the violence he found in Paris.⁶² In letters home, he could not help but condemn the breakdown of authority and the failure to protect individual rights and legal proceedings regarding the individual: “the same violence in equal opposition to the constitution is practic’d [sic] on a minority of the executive & on several citizens whose only offense was that they had printed free comments on the conduct of the [D]irectory & of the armies. These excesses cannot

⁵⁹ Smith, *John Marshall*, 204

⁶⁰ John Marshall, “Paris Journal,” *The Papers of John Marshall*, Vol. III, 277.

⁶¹ Smith, *John Marshall*, 221

⁶² Jack L. Cross, “John Marshall on the French Revolution and on American Politics,” *The William and Mary Quarterly*, Vol. 12, No. 4 (Oct. 1955): 631

have been necessary.”⁶³ Marshall’s experience in France reinforced his belief in an independent judiciary that could not be suppressed by a political regime. His contributions to the negotiations deepened his Federalist loyalties, as he saw first-hand what chaos could arise from unchecked mob rule. And it is through his experiences in France that his loyalty to Washington, Adams, and Federalist policies is strengthened.

VIII: Federalist Hero

After Marshall returned from France, his popularity soared. The American public was outraged over how the French treated the Americans, and as result the American representatives were hailed as heroes who stood up for the morality and liberty of the young republic. The positive press Marshall received from the XYZ Affair helped launch his career into national politics.

Yielding to Washington’s requests that he run for public office again, Marshall returned to Richmond after a visit at Mount Vernon and declared his intent to run for Congress.⁶⁴ Marshall ran against John Clopton, securing a margin of victory by 114 votes on April 24, 1799.⁶⁵ Representing Richmond, Marshall had garnered support from many Republicans. Despite having established himself as a supporter of President Adams and Federalist policies in general, he was a leading moderate in the House of Representatives.⁶⁶

Marshall entered the House of Representatives when the Sixth Congress convened. In a House that was quickly dividing into political factions, Marshall emerged as a leading

⁶³ John Marshall to the Secretary of State, The Hague, Sept 15, 1797, in “John Marshall on the French Revolution and on American Politics,” ed. Jack L. Cross, *The William and Mary Quarterly*, Vol. 12, No. 4 (Oct. 1955): 634

⁶⁴ Smith, *John Marshall*, 241

⁶⁵ *Ibid.*, 242

⁶⁶ *Ibid.*, 254

Federalist, especially as a result of the Nash Affair. In 1799, the Republicans accused President Adams of executive malfeasance because he had decided to extradite sailor Thomas Nash (alias Jonathan Robbins) to Great Britain for trial on charges of mutiny and murder. Republicans claimed Adams inappropriately interfered with the judiciary in ordering the extradition, as the Constitution gave the Courts jurisdiction over cases involving extradition.⁶⁷ Republicans brought forth a measure in Congress to censure Adams. In a move that would establish him as a leader of the Federalist Party, Marshall quickly came to the President's defense. In a communication printed in the *Virginia Federalist* on September 7, 1799, Marshall defended the President's actions as within the terms of the Treaty of Amity between the United States and Great Britain. He argued that though the judiciary does have authority over questions involving treaties, this question in particular demanded action by the executive, and thus "the President appears to have done no more than his duty."⁶⁸

Marshall had again constructed an argument in defense of Adams that showed Marshall's keen mind and emphasis on logic and reason. He argued that the Executive was the one branch of government empowered to proceed in foreign relations, but that he is not the only actor. The president, Marshall continued, is bound by acts of Congress. In another demonstration of constitutional supremacy, Marshall stated that under the Constitution, acts of Congress can be considered as supreme law of the land. Adams was acting within the confines of the Treaty and also the acts of Congress, and thus did not act inappropriately.

⁶⁷ *Ibid.*, 259

⁶⁸ John Marshall, "Communication" September 7, 1799, in *The Papers of John Marshall*, Vol. IV ed. Charles T. Cullen and Leslie Tobias, (Chapel Hill: University of North Carolina Press), 28

Marshall was duly rewarded for his loyalty to the president. In 1800, Adams appointed him to the office of Secretary of War, succeeding James McHenry.⁶⁹ Marshall only held this position for a few months, as he was quickly appointed as Secretary of State after Timothy Pickering vacated the office. The offer of Secretary of State was attractive to Marshall. For one thing, the position would bring him an increased income. But Marshall's eagerness to return to foreign affairs after his experience in Paris was the ultimate motivation behind his acceptance of the nomination.⁷⁰

As Secretary of State, Marshall cemented his leadership within the Federalist Party. Employing his consensus-building skills, one of his greatest challenges was to maintain some degree of cohesion between the high Federalists and the more moderate Federalists. Marshall's duties as Secretary of State dealt with the operations of the federal government. The construction of the new capitol, Washington City, was one of the main duties of which he had to oversee.⁷¹ The arena of foreign policy was remarkably quiet. The conflict with the Barbary pirates—a problem that would ultimately come to a climax during the presidency of Thomas Jefferson—had not yet become a major concern. The British subjects continued to press for payment of debts owed them by American citizens, and Marshall's extensive involvement in the British debt cases made him extremely knowledgeable about the problem and thus well prepared to deal with the issue as Secretary of State. In France, Napoleon was on the ascent as emperor, but the series of wars with Great Britain and her allies had not yet begun in earnest.

⁶⁹ John Marshall to John Adams, Philadelphia, May 8, 1800, in *The Papers of John Marshall*, Vol. IV, 148

⁷⁰ Editorial Note on John Marshall as Secretary of State, *The Papers of John Marshall* Vol. IV MP vol 4, 156-160

⁷¹ *Ibid.*, 158

Marshall's rise to leadership in the Federalist Party, especially as occupant of high office within the federal government, seems unusual given that he was a Virginian. One would have expected him to be influenced by regional interests and become, like his cousin Thomas Jefferson, a leading Republican. Instead, he advocated for a strong national government and the supremacy of the United States Constitution over state constitutions. It was his involvement in the several levels of politics that ultimately informed his political ideology. His service in the Continental Army created his support for a government strong enough to supply and command the military. His tenure in Virginia politics helped him construct his arguments for constitutional supremacy. His part in the ratification of the Constitution cemented his support of an independent judiciary as the cornerstone of liberty. His contributions in France furthered his belief in a central government strong enough to defend against chaos. When Marshall became a leader in the Federalist Party and in the national government, these political ideas came together and formed his political ideology.

Marshall's differences with other leading Virginians can be attributed to other factors as well. Washington served as a primary mentor to Marshall. With his father's relationship with the Virginia farmer, Marshall's own service under the general, and his biography *The Life of Washington*, Marshall's political ideology was shaped by Washington. While Washington was neither declared as Federalist nor a Republican, his leanings clearly tended towards the Federalist side. This shaped Marshall's views. Some of Marshall's other Virginia colleagues, most prominently James Madison and James Monroe, were mentored by Thomas Jefferson. They were thus influenced by his ideals and subscribed to his views. This was not the case for Marshall. Though perhaps partly

fueled by his dislike for Jefferson, Marshall's support for the Federalist cause was undoubtedly influenced by his mentorship from Washington.

Foreign policy created another divide between Marshall and his Virginia brethren. While most of the Virginia coalition supported a stronger relationship with France, Marshall continually advocated repairing ties with Britain. After Marshall's experience in Paris, this antagonism towards France was even greater, and the divide him and Virginia Republicans even sharper.

Marshall's personal economic status developed a connection between him and Federalists of New England and the Mid-Atlantic States. Marshall was not a large plantation owner like many of his Virginia counterparts. While he did possess quite a bit of land, he never attempted large-scale agriculture. As a result, he did not have the agrarian interests in common with other Virginia representatives. As a lawyer, he was much more business minded, like the Northern Federalists. Marshall also had a different view of debt than the Virginia gentry. Marshall also saw firsthand the negative impact of the large debts accumulated by the landed aristocracy from his position as an attorney in the center of the British debt cases.⁷² All of these factors would shape the political ideology of the fourth Chief Justice of the Supreme Court of the United States.

⁷² T. H. Breen, "Horses and Gentlemen: The Cultural Significance of Gambling among the Gentry of Virginia," *The William and Mary Quarterly*, Vol. 34, No. 2 (April 1977): 246

CHAPTER THREE: *Marbury v. Madison*

I: The Election of 1800

Marbury v. Madison arose from one of the most significant presidential elections in American history. To understand how Marshall's life impacted the opinion he wrote, one must first have an understanding of the case he was deciding and the political nuances involved. The political environment surrounding the Election of 1800 was hardly one of calm, national unity. Washington had stepped down from the presidency in 1796, and in his Farewell Address, he warned against political factions. Yet, deep political lines had been drawn between the two parties that had developed since the creation of the Constitution: the Federalists, with their belief in a strong national government and desire to build good relations with Great Britain, and the Democratic Republicans (also referred to as the Jeffersonian Republicans, or simply the Republicans) who supported states rights at the expense of a weak federal government and building better relations with revolutionary France. In 1796, Washington's vice-president John Adams had been elected president, with the Republican Thomas Jefferson serving as his vice-president.

President Adams was highly unpopular. Lacking Washington's diplomatic personality and general presence, Adams was unable to hold together the bickering members of his cabinet. His policies were as unpopular as his disposition. The Alien and Sedition Acts, signed into law in 1798, were viewed as censorship and against the very principles of the Revolution. Perhaps what contributed most to his unpopularity, though, was his support of the Jay's Treaty.¹

¹ David McCullough, *John Adams*, (New York: Simon and Schuster, 2002), 474

In 1794, President Washington asked John Jay to lead negotiations with Great Britain, in an attempt to solve lingering issues after the Revolution, including British presence on the frontier, conflicts regarding trade, and the recent practice of British seizure of American sailors and ships. The treaty was ultimately a failure for the Americans. When the terms were made clear to the Congress in Philadelphia, it was obvious where the opposition would rise. The Americans had given up almost every point to the British in return for next to nothing. While the British had agreed to remove their troops from the frontier, an agreement which they would not completely honor until the end of the War of 1812,² the treaty failed to address the issues of trade and completely ignored the conscription of American sailors.³ Worse still, as scholars have pointed out, the treaty “accepted British economic superiority; it tolerated British naval supremacy; it failed to secure compensation to American slave owners for slaves kidnapped by the British during the Revolution; it refused to give any guarantee against the British navy’s practice of stopping American vessels to impress seamen; and it...tilted away from France and towards Britain.”⁴ The Republicans were completely opposed to the Treaty and even the Federalists were less than thrilled. Washington did lend his support to the Treaty, however, and after a brutal and bitter political battle over the Treaty, the Senate ultimately approved it in August, with Washington signing the Treaty into law on August 20, 1794.⁵

As Washington’s successor to the Presidency, Adams tried to maintain Federalist strength and influence. In choosing his cabinet, he held over the four department heads

² Catherine Allgor, *A Perfect Union: Dolley Madison and the Creation of the American Nation*, (New York: Henry Holt and Company, 2006): 286

³ McCullough, *John Adams*, 456

⁴ Jay Winik, *The Great Upheaval: America and the Birth of the Modern World 1788-1800*, (New York: HarperCollins Publishers, 2007): 494

⁵ *Ibid.*, 497

from Washington's cabinet in an attempt to continue Federalist harmony.⁶ This would in fact create more discord than harmony and the bitter political rivalries that had surfaced during Washington's term would become more pronounced under Adams's presidency. This would not be the only problematic note of the four years Adams served as president. A series of unpopular decisions, including the aforementioned Alien and Sedition Acts, his continued backing of Jay's Treaty, and his refusal to support the French Revolution made him a very unpopular candidate for reelection in the Election of 1800.

Thomas Jefferson was by far the leading presidential nominee for the Republican Party during the Election of 1800. Adams, as the incumbent Federalist president, was the nominee for the Federalist Party. The campaign was brutal and marked by negativity. The previous three elections had been somewhat calm and peaceful; this election was anything but calm. Adams, already unpopular, was portrayed as a monarchist and a British sympathizer. Jefferson and Republicans played on unflattering views of Adams, describing how he would storm around shouting obscenities at his cabinet, "dashing and trampling his wig on the floor."⁷ But the Federalists portrayed Jefferson as equally dangerous. His critics often attacked him regarding his religion, describing him as a man without religion who would lead the country into moral decline. Hamilton described his fears to Jay, calling Jefferson "an *atheist* in religion and a *fanatic in politics*."⁸ The election was marked by negativity, leading to a general fear that if a Republican did win, there would not be a peaceful transition of power.

⁶ McCullough, *John Adams*, 471

⁷ Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Vintage Books, 1996): 222

⁸ Ron Chernow, *Alexander Hamilton*, (New York: Penguin Group, 2005): 609

The actual election was an example of masterful political maneuvering. The Federalists controlled the electoral votes in the New England States; the Republicans would hold the states in the South and the West. Jefferson predicted that the election would come down to the Mid-Atlantic states, suggesting that New York would most likely decide the election.⁹ The result of the April election in New York pitted Federalist Alexander Hamilton against Republican Aaron Burr. Burr was not as prominent as Hamilton nationally or as a nominee until the last stage of voting. With a superior political strategy, Burr and the Republican slate of candidates carried the New York City election, thus clinching the New York vote for Jefferson.¹⁰ The Federalists were thrown into chaos after the New York election. Hamilton began plans to undermine Adams's position as the Federalist nominee by maneuvering for South Carolinian Charles Cotesworth Pinckney, the former Minister to France, to receive the Federalist electoral votes.¹¹

By December 1800, the election had deteriorated into malicious personal attacks on every candidate, regardless of party. On February 11, 1801, the results of the electoral votes cast by the state presidential electors were revealed to the Senate, and revealed a problem: Jefferson and Burr tied for the number of votes, each with seventy-three votes.¹² Pursuant to Article II, Section 1 of the Constitution, the tie vote then went to the House of Representatives, as “if there be more than one who have...an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot

⁹ James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (New York: Simon and Schuster, 2002), 119-120

¹⁰ *Ibid.*, 121

¹¹ *Ibid.*, 122

¹² Chernow, *Alexander Hamilton*, 635

one of them for President.”¹³ Adams had not won reelection, and it was definite that the next president would be a member of the opposite party. The question was who? The House could no more easily decide the winner than the state electors. The first round of voting resulted in continued deadlock. The Federalists knew that they had lost the election and threw their support to Burr in an attempt to keep the presidency from the “fangs of Jefferson.”¹⁴ Hamilton then went to work. He focused on Representative James A Bayard, a Delaware Federalist. For two months he bombarded him with letters discrediting Burr’s Federalist positions. Finally, after thirty-five ballots cast in the House, Bayard submitted to Hamilton’s arguments and submitted a blank ballot, effectively removing the Delaware vote from Burr and deciding the election in favor of Jefferson.¹⁵

In the one month between the final vote in favor of Jefferson and his inauguration, Adams would make several decisions that would profoundly influence the course of the early history of the republic. One of those came soon after Chief Justice Oliver Ellsworth resigned his position. Adams thus had to find a replacement. He turned first to former chief justice John Jay, who declined the position. He then had another name in mind. According to Marshall’s account of events, he and the outgoing president were discussing several issues in the president’s office, including the nomination of the Supreme Court chief justice, when Adams remarked “Who shall I nominate now?” Marshall replied that he did not know. Adams then stated “I believe I must nominate you.”¹⁶

¹³ U.S. Constitution, Article II, Section 1

¹⁴ Simon, *What Kind of Nation*, 122

¹⁵ Chernow, *Alexander Hamilton*, 637-638

¹⁶ Smith, *John Marshall*, 14

Marshall's nomination may have been a matter of convenience, but he was also an appropriate choice for Adams.¹⁷ Both Adams and Marshall understood that there was a certain sense of urgency for Adams to make a nomination: with only a month left until Jefferson's inauguration, Adams needed to act fast in order to take advantage of the vacancy to fill it with a Federalist justice. Marshall had been steadfastly loyal to President Adams, serving as an emissary to France during the XYZ Affair and Secretary of State. He was a staunch Virginia Federalist, a leader of the party, and a respected attorney and politician.¹⁸ Marshall had demonstrated a rational approach to policy issues, including a firm but modest opposition to the unpopular Alien and Sedition Acts, the ability to defend administration policies, and a "political acumen and good judgment" that earned him the respect of figures on both sides.¹⁹ Marshall may have been nominated because he was a convenient solution, but he had demonstrated a loyalty to the Federalist policies, a rational and sensible approach to politics, and a logical, intelligent understanding of law that made him not just a convenient, but a wise choice for nomination. The next day after Adams and Marshall had their discussion, Adams sent his nomination to the Senate. The nomination brought some unexpected resistance from the High Federalists, who hoped that Adams would withdraw the nomination in place of Justice William Patterson. But Adams held to his choice; Marshall was unanimously confirmed as the fourth chief justice of the Supreme Court of the United States on January 27, 1801. He would send a note a week later to Adams, offering the president his appreciation, saying

¹⁷ Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835*, (Columbia: University of South Carolina Press, 1997), 9

¹⁸ *Ibid.*, 10

¹⁹ *Ibid.*, 11

I pray you to accept my grateful acknowledgements for the honor conferred [sic] on me in appointing me chief Justice of the United States. This additional & flattering mark of your good opinion has made an impression on my mind which time will not efface. I shall enter immediately on the duties of the office & hope never to give you occasion to regret having made this appointment.²⁰

Marshall's appointment as chief justice was not the only appointment Adams would make before he vacated the presidency. A series of justice of the peace positions were vacant and Adams did not want to lose the opportunity to fill them. On March 3, just one day before Adams was to leave the presidency, all forty-two nominations were rushed to the president for his signature. Adams's intent was clear: he wanted to stack the judiciary with Federalist judges. In the wake of the recent change to Republican controlled executive and legislative branches, Adams viewed the judiciary as the last Federalist stronghold.²¹ The night before Jefferson's inauguration, Adams sat signing commissions. A clerk waited to rush them back to Secretary of State Marshall, who held the position simultaneously with chief justice for a brief period. Because of the chaos that ensued with the presidential turnover, not all of the commissions were delivered. One in particular, the commission for William Marbury, was entrusted to Marshall's younger brother, James. James Marshall, who himself had been awarded a justice of the peace appointment by President Adams, took a batch of the commissions to Alexandria, Virginia. He would later be unable to recall for certain whether or not he had taken the commissions for Marbury, or his three other fellow future plaintiffs, in particular.²²

The events of March 4, 1801 marked a revolution in another sense. Twenty-five years earlier, a group of men declared their right to representative government free from

²⁰ John Marshall to John Adams, February 4, 1801, in *The Papers of John Marshall*, Vol. VI ed. Charles F. Hobson, Fredrika J. Teute, and Laura S. Gwilliam, (Chapel Hill: University of North Carolina Press), 73

²¹ Simon, *What Kind of Nation*, 173

²² *Ibid.*, 174

oppression. On March 4, 1801, they realized the success of their revolution. The peaceful transfer of power from one party to another after an election signaled to the country—and the world—that this experiment might very well succeed. But the Revolution of 1800—as Jefferson termed the election—had another, less pronounced, meaning. As Chief Justice John Marshall administered the oath to President Thomas Jefferson, a subtler revolution was occurring. For after the tenures of Marshall and Jefferson in their respective positions, neither office would look the same.

On March 2, 1801, Jefferson wrote to Marshall requesting a favor of the Chief Justice. “I propose to take the oath or oaths of office as President of the U.S. on Wednesday the 4th [of March] at 12. o’clock in the Senate chamber. May I hope the favor of your attendance to administer the oath?”²³ Marshall responded in the affirmative, writing “I shall with much pleasure attend to administer the oath of office on the 4th, & shall make a point of being punctual.”²⁴ Jefferson and Marshall both knew the precarious political situation at hand. Long time foes, each respected the other’s political abilities. Marshall knew the extent of Jefferson’s influence; Jefferson was well aware of Marshall’s legal abilities and his leadership among the Federalists. The significance of Marshall administering the oath of office to his political enemy was not lost to either man. Both Marshall and Jefferson recognized the need for political unity after the long and bloody election. Jefferson’s inaugural address presented a theme of reconciliation between the two political factions. In addition to the famous phrase “We are all republicans; we are all federalists,” Jefferson went on to say

²³ Thomas Jefferson to John Marshall, Washington, March 2, 1801, in *The Papers of John Marshall*, Vol. VI, 86

²⁴ John Marshall to Thomas Jefferson, Washington, March 2, 1801, in *The Papers of John Marshall*, Vol. VI, 87

If there be any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government cannot be strong, that this government is not strong enough...I believe this, on the contrary, the strongest government on earth...Let us, then, with courage and confidence, pursue our own federal and republican principles, our attachment to union and representative government.²⁵

In his speech, Jefferson attempted to address the Federalist belief that a strong central government was the only way to preserve the union. He attempted to soothe the fears of Federalists like Marshall by reminding them he would not disintegrate the Union, that he would not pursue a solely French alliance, and that he would preserve the government and the strength of the nation.²⁶

Despite Jefferson's attempts to encourage an early form of bipartisanship, he and Marshall were setting the foundation for a legal and political showdown. Jefferson had an agenda when it came to the executive branch, but with Marshall sitting in the Supreme Court, he knew the Chief Justice would be watching his every move. Marshall knew that in order to limit Jefferson's intent to lead the country down a decidedly Republican path he would need to use the Courts as a tool to temper Jefferson's power. As scholars have described, "whereas Jefferson viewed the federal courts as centralizing, partisan obstacles to his republican vision, Marshall considered them bulwarks of union and protectors of law and, not incidentally, private property from irresponsible debtors."²⁷ As Marshall and others well knew, Jefferson viewed the Courts as weak and powerless. Marshall's leadership experiences had prepared him for this battle: his ability to gain consensus would be put to the test in creating majorities on the Court to combat

²⁵ Thomas Jefferson's Inaugural Address, Washington, March 4, 1801, in *The Papers of Thomas Jefferson*, Vol. 33 (Princeton: Princeton University Press, 2006): 134-152

²⁶ Simon, *What Kind of Nation*, 143-144

²⁷ Simon, *What Kind of Nation*, 148

the Executive. Marshall knew he had two objectives: to strengthen the Supreme Court and to limit Jefferson's power. Marshall's success at these objectives would come through his pragmatism. His entire life had developed his pragmatic nature: now that rational and logical mind would be put to the test.

II: *Marbury v. Madison*

After Jefferson was inaugurated in 1801, he learned of the remaining commissions from Adams's Midnight Appointments. As James Madison would not take office as Secretary of State until May, Jefferson sent instructions to his attorney general Levi Lincoln to withhold the remaining commissions. Since they were signed by the outgoing president, Jefferson felt no need to distribute the commissions. After ordering the commissions withheld, Jefferson then attempted to combat Adams's attempt at stacking the federal judiciary with Federalist judges. He replaced the list of forty-two appointments with thirty of his own.²⁸ As a result of both the shorter list and Jefferson's refusal to deliver the remaining commissions, several of Adams's nominations for justices of the peace did not receive their commissions. Among those nominations was William Marbury, a Georgetown businessman and a loyal Federalist.²⁹ In early 1801, Marbury sought to recover his undelivered commission. He turned to Charles Lee, the former Attorney General under Presidents Washington and Adams, who filed a request with the Supreme Court for a show-cause order for a writ of mandamus.³⁰

Before one can appreciate the issues at the center of Marbury's case and the lasting impact of Marshall's decision, one must understand the structure of the federal

²⁸ *Ibid.*, 174

²⁹ Smith, *John Marshall*, 300

³⁰ Leonard W. Levy, *Original Intent and the Framers' Constitution*. (New York: MacMillan Publishing Company, 1988), 78

court system in 1801. The early Supreme Court of the United States was not a force of power. It was instead a weak institution, with little prestige, and justices had to be convinced to serve. Questions often arose regarding the extent of the Court's power, the processes, and the ability of Congress to influence—or control—the judicial branch. The Constitution left the judicial branch in a decidedly inferior position to the other two branches. Article III of the Constitution gives only the basic framework of the federal court system. This was mainly a result of compromise between the framers at the constitutional convention. Fears that a federal judiciary would overwhelm and suppress state courts created conflict over just what would be established as the Supreme Court. The Constitution is a political document, the result of political compromises made at the Convention. As a result, the judicial branch was quite vague. The judiciary would develop through actual practice and through further legislation by Congress and Marshall's opinion in *Marbury* was a major landmark in that process.

In 1789, after the Constitution had been ratified and George Washington had been sworn in as the first president, the federal courts barely existed. The Supreme Court was essentially the only level of the federal court structure in existence. And even that body was skeletal. The Constitution had laid out only the barest of provisions for the Court in Article III. It established the authority of the Court, dividing it between Original and Appellate jurisdiction. Under Original jurisdiction, the Court had authority “in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” Under its Appellate jurisdiction, the Court had the power “in all the other Cases before mentioned” referring to the specified cases involving

all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies

to which the United States shall be a Party;—to Controversies between two or more States;—[between a State and Citizens of another States;—] between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]

This was a very limited mandate, describing only a few specific types of conflicts. In addition, there was at yet no lower court structure. The First Congress knew that one of their first obligations would be to craft legislation establishing the rest of the federal court structure and expand upon the Supreme Court’s jurisdiction.

The Judiciary Act of 1789 established the lower federal courts and expanded the Supreme Court. Where the Constitution allowed for Congress to determine the number of justices who would sit on the Supreme Court, the Judiciary Act fulfilled that requirement by stipulating that one chief justice and five associate justices would sit on the Supreme Court. The Judiciary Act also established the term of the Court, creating two sessions—one commencing in February and the other in August.³¹

The Judiciary Act further sketched in the rest of the federal court structure. Section 2 established the original thirteen districts; Section 3 established the District Courts in each of the aforementioned districts and the sessions that court would be held (each court was to hold four annual sessions). Section 4 established the Circuit Courts of Appeal; Section 5 established when the circuit courts would be in session. Other sections of the Judiciary Act laid out the specific details regarding the oaths a justice would swear, the order of seniority between justices, the procedure for convening quorum on the Supreme Court, and detailed the powers and jurisdiction of the district and appeals courts.

³¹ *The Judiciary Act of 1789*, 1 Stat. 73. 1st Congress, (1789), §1

Section 13—the portion of the Judiciary Act at issue in *Marbury v. Madison*—addressed the jurisdiction of the Supreme Court, reiterating mostly those cases identified by the Constitution as being under the jurisdiction of the Supreme Court, but also expanding them. It reads

And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against the citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States.³²

While Section 13 reiterated the Court’s original jurisdiction, it also expanded the Court’s power, allowing it to issue writs of prohibition and writs of mandamus. The Constitution did not explicitly give that power to the Supreme Court, but the Judiciary Act of 1789 did. This difference in assigned powers would become problematic for Marshall, and would be the center of his focus in his written opinion in *Marbury*.

In 1801, Congress had passed the Judiciary Act of 1801 (also often referred to as the “Midnight Judges Act.”) The 1801 Act attempted to correct and amend the Judiciary Act of 1789. The 1801 Act increased the number of judges in the lower district courts and, most notably, established the June and December terms of the Supreme Court.³³ In 1802, the Senate began to move to repeal the 1801 Judiciary Act. In its place was the

³² The Judiciary Act of 1789, §13

³³ The Judiciary Act of 1801, 2 Stat. 89, 6th Congress (1801)

Judiciary Act of 1802. The 1802 Act substituted legislation that made three major changes to the Supreme Court: first, it required each of the justices to ride circuit. Second, the 1802 Act abolished the June and December terms for the Supreme Court that had been established in the 1801 Act. Third, the 1802 Act restored the February, but not the August, term of the Supreme Court, a provision that was in the original 1789 Judiciary Act.³⁴ This rescheduling of Supreme Court sessions had the overall effect of cancelling sessions of the Supreme Court for the entire 1802 calendar year, meaning *Marbury* would have to wait until the Court resumed in February 1803.

Marshall did his best to keep the judiciary out of the political battle between the High Federalists and the Republicans.³⁵ The High Federalists were angered over the Republican 1802 legislation and wanted Marshall to void the act as unconstitutional. Since the next session of the Supreme Court would not be held until 1803, the Federalists mounted a different assault on the bill. In the fifth circuit—specifically that circuit since it was the one over which Marshall presided—arose the case *Stuart v. Laird*. The case involved an issue over a debt owed to Virginia resident Hugh Stuart by Maryland resident John Laird.³⁶ After being decided in favor of Laird, Stuart appealed to the Supreme Court, where Charles Lee quickly challenged Marshall’s authority to hear the case under the new Judiciary Act of 1802 by claiming that Congress had no authority to order the justices to ride circuit. The case bore a similarity to *Marbury* in that the issue involved congressional legislation that expanded the powers of the Court.³⁷

The Supreme Court finally resumed in February 1803, with two cases—*Marbury v. Madison* and *Stuart v. Laird*—at the top of its docket, both challenging the

³⁴ The Judiciary Act of 1802, 2 Stat 156, 7th Congress (1802)

³⁵ Smith, *John Marshall*, 310

³⁶ *Stuart v. Laird*

³⁷ Smith, *John Marshall*, 311

constitutionality of Congressional legislation. *Marbury* was argued first. The principle issue at hand seemed to be whether or not Marbury had a right to his commission and whether or not the Court would force Madison to deliver the commission. Lee, on February 10, made his opening arguments demonstrating why the Court should issue the writ of mandamus. Madison, on the other hand, not only refused to respond to the show-cause order, he refused to attend the proceedings in any manner. His refusal indicated his low opinion of the Court's authority.³⁸

Because Marbury was suing under original jurisdiction, the Supreme Court operated as a trial court. One issue of concern was how Marshall's position as former secretary of state would be treated, since he held the office when the commission was supposed to be delivered. Without the certified record of Senate confirmation for Marbury, Lee built his case on the testimony of the State Department clerks, leaving Marshall out of the questioning. Lee's first witness was Jacob Wagner, the chief clerk for the Department of State. Wagner stated that he had been serving as Jefferson's personal assistant at the time of the transition and that as a result, he had no direct knowledge regarding the justice of the peace commissions. Lee called Daniel Brent to testify next. Brent served as assistant to Wagner, and he testified that he had in fact seen the commissions but did not think they had been sent out and did not know what happened to them.³⁹

Lee's next witness was Attorney General Levi Lincoln. Lincoln had replaced Marshall as the interim secretary of state the day after Jefferson's inauguration while Marshall assumed his duties as chief justice. Lincoln claimed executive privilege, declining to state whether or not he was aware of Jefferson's order not to deliver the commissions. Lincoln stated that though he respected the authority of the Court, he also

³⁸ *Ibid.*, 316

³⁹ *Ibid.*, 316

felt bound to maintain the rights of the executive and asked Marshall if his testimony was necessary. Marshall, understanding the position Lincoln was in, instructed Lee to put his questions to Lincoln in writing. Through Lincoln's deference to the Court's authority and Marshall's respect of executive privilege, it was clear that each was trying to limit the potential conflict between the two branches.⁴⁰

Closing arguments were made on February 11, after Lincoln took the witness stand. During his testimony, he answered three of Lee's four inquiries (Lincoln declined to answer the fourth question of whether Madison ever had possession of the commissions, and Marshall upheld his denial by saying the question was immaterial.)⁴¹ Lincoln testified that he had in fact seen the commissions and that they had been signed and sealed by President Adams, but he did not know if any of them were for Marbury; he also stated he did not know if any of the remaining commissions had been delivered, but believed none of them had.⁴² Lee then submitted a sworn affidavit from Marshall's brother James that he had tried to deliver the commissions but had been unable to deliver some of them in Alexandria and had thus returned them to the State Department.⁴³

After Lee's closing arguments, Lincoln stated that he had not heard from Secretary of State Madison regarding his position. Marshall, however, was uncomfortable and upset that Madison had not made any statement or appearance in the case. To Marshall, this undermined the adversarial process that the Court was to protect, the process at the heart of the American legal system.⁴⁴

⁴⁰ *Ibid.*, 317

⁴¹ *Ibid.*, 317

⁴² Simon, *What Kind of Nation*, 180

⁴³ *Ibid.*, 318

⁴⁴ *Ibid.*, 318

Having heard the facts of the case, Marshall was placed in a difficult position. Any decision he handed down would anger either the Federalists or the Republicans. If he decided in favor of Marbury, the Federalists would be pleased, but the Republican executive would perhaps not obey the order, revealing the Court's lack of power and weakening any influence the judicial branch would preserve. Deciding in favor of Jefferson and the executive, however, meant rejecting the legitimate claim to executive privilege—an argument used by Lincoln during the trial both to avoid answering questions and also to defend the executive's actions—and deciding against Marshall's own party.⁴⁵ In addition to the political consequences of Marshall's decision, there were legal and constitutional ramifications. Taken in combination, *Marbury* and *Stuart v. Laird* represented the largest constitutional battle yet between the three branches, as both cases challenged the validity of specific acts of Congress. If Marshall issued the writ of mandamus, he legitimized the Congress's right through the series of judiciary acts to change and direct the Court's jurisdiction. But again, finding in favor of Marbury meant revealing the extent of the Court's weakness, as the Executive would simply ignore the court order. This was the issue that Marshall had been preparing for his entire life: the independence of the judiciary from outside political influence.

III: Decision of the Court

The eleven thousand word opinion that Marshall handed down not only addressed the current political tension and the issue of judicial independence, but it changed the scope of judicial power in America.⁴⁶ Marshall started the opinion by

⁴⁵ William F. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, (Lawrence: University of Kansas Press, 2000), 60

⁴⁶ For the text of the opinion in *Marbury v. Madison* see Appendix B

addressing Lee's three questions, albeit in a different order. Marshall began by stating that Marbury did indeed have a right to his commission. Marshall treated the commission as property, and thus responded to Marbury's claim to his commission as though he is pursuing lost property.⁴⁷ By not receiving his commission, Marbury's right to his property was violated. Because Marbury's commission was property, and Marshall read the Constitution as protecting property, Marshall held that Marbury did indeed have a legal right to remedy in pursuing his lost property, saying "[i]t is, then, the opinion of the Court [that Marbury has a] right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy."⁴⁸

But then Marshall deviated away from the questions posed by Lee. Marshall turned to the question of whether Marbury was entitled to the remedy he seeks from the Supreme Court, namely the writ of mandamus that would have forced Madison to deliver the commission. Marshall referred to the Judiciary Act of 1789, where it gave the power to the Supreme Court to issue writs of mandamus. Marshall described how the Secretary of State fit the description of a person holding office under the United States. But then he said that the Court cannot issue this writ: "if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore incapable of conferring the authority, and assigning the duties which its words purport to confer and assign."⁴⁹ The Court could not issue the writ because the law itself is unconstitutional.

From here, Marshall proceeded into the argument that gives *Marbury v. Madison* its lasting legacy. He cited the jurisdiction laid out for the Supreme Court in Article III,

⁴⁷ Nelson, *Marbury v. Madison*, 73

⁴⁸ *Marbury v. Madison*

⁴⁹ *Marbury v. Madison*

Section 2 of the Constitution, and argued that the original jurisdiction of the Supreme Court was fixed and specifically laid out in the Constitution. Congress could change appellate jurisdiction, but original jurisdiction was fixed. Marshall then argued that this was true because every clause in the Constitution is intentional, saying that “it cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.”⁵⁰ Because Marshall believed that everything written in the Constitution is intentional, the definitions of *original* and *appellate* jurisdiction of the Supreme Court as laid out in Article III, Section 2 were specific and definite. The Judiciary Act of 1789 changed the Supreme Court’s original Jurisdiction, adding to it the power to issue writs of mandamus. Because the Constitution specifically defined the Court’s Original Jurisdiction and the Judiciary Act of 1789 increased it beyond that specific definition, the 1789 Act is therefore invalid. Marshall then stated that the power to “issue writs of mandamus to public officers, appears not to be warranted by the constitution.”⁵¹ If this was true, then the 1789 Act is contradictory to the Constitution. And if it was contradictory to the Constitution, could it be a valid law?

In response to this question, Marshall asserted the supremacy of the Constitution, saying the “constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts... a legislative act contrary to the constitution is not law.”⁵² Marshall’s argument was based on the tenant that the Constitution is the supreme law of the land. The Judiciary Act of 1789 was invalid because it contradicted the Constitution. Marshall here invoked the Supremacy

⁵⁰ Marbury v. Madison

⁵¹ Marbury v. Madison

⁵² Marbury v. Madison

Clause found in Article VI, which stated that “this Constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”⁵³ Because the Constitution is the supreme law, any legislative or other action must be in agreement with it: because the 1789 Act violated the Constitution by inappropriately increasing the Court’s Original Jurisdiction, it could not therefore be valid law.

Marshall then declared that the power to evaluate whether laws violate the Constitution belongs to the Supreme Court. In his famous line, he says “it is emphatically the province and duty of the judicial department to say what the law is...if two laws conflict with each other, the courts must decide on the operation of each.”⁵⁴ He asserted that the courts were the appropriate branch of the government to look into cases where conflict arises regarding the constitution. Judges take oaths to “discharge [their] duties agreeably to the constitution;” the framers thus intended for the courts to be the instrument of interpreting the constitution. In Article VI, the Constitution demands that the “judges in every State shall be bound thereby” thus directing all judges to uphold the supremacy and authority of the Constitution. Since judges swear this oath, the constitution must therefore be supreme to all other laws—if the Constitution is not the basis for all government then the oath itself is invalid and a mockery of law.⁵⁵ Because the Court was bound to uphold the Constitution, which is the supreme law, they therefore have the power of judicial review. The judiciary was the branch to interpret whether legislative or executive action is in line with the Constitution, and if that action did not align with the Constitution, the Court had the authority to declare law unconstitutional.

⁵³ U.S. Constitution, Article VI

⁵⁴ Marbury v. Madison

⁵⁵ Marbury v. Madison

IV: Creating the Third Branch

Marbury v. Madison became such an influential case because it claimed for the Court the power of judicial review. But why was this case the one to become such a landmark decision? After all, *Stuart v. Laird* was argued before the Court at the same time as *Marbury*, and it too dealt with the issue of Congress changing the Supreme Court's jurisdiction. Why *Marbury* instead of *Stuart*? The difference in the political parties involved in the cases was ultimately what led Marshall to use *Marbury*, not *Stuart*, as a power play for the Court. *Stuart* involved the Judiciary Act of 1801, which the Federalists also wanted to see overturned, but it did not directly involve the executive. The 1801 Act changed the jurisdiction of the courts, but in that case, the Supreme Court deferred to Congress and allowed the change in jurisdiction. There were political reasons for this decision: Marshall fully understood that if he used *Stuart* to assert the Court's power of judicial review, he would not have the opportunity to strike at the Executive.⁵⁶ In addition to establishing the power of judicial review, Marshall wanted a way to censure the Republican executive. The players in *Stuart* did not involve prominent government officers from the executive branch as *Marbury* presented.

So the question arises: did Marshall have his mind made up of how he wanted to decide the case before he even heard the arguments in *Marbury*? Because *Stuart* and *Marbury* were heard at the same time, it is not unrealistic to infer that Marshall looked at the cases to see which one would make a stronger impact and would better serve his purpose. It seems clear that Marshall was looking for a way to reign in Jefferson and the

⁵⁶ "Marbury v. Madison," Washington, February 24, 1803, in *The Papers of John Marshall*, vol. VI, 163

Executive branch.⁵⁷ Marshall personally did not like Jefferson, but as a Federalist, he was also concerned about Republican policies not being checked. With Secretary of State Madison being involved in one of the cases, it seemed more advantageous to use *Marbury v. Madison* as the vehicle to check the Executive.

By looking at the language Marshall actually uses in the decision, it can be inferred that he truly believed in his claim that Section 13 of the 1789 Judiciary Act was unconstitutional.⁵⁸ The manner in which he lays out his argument and the principles upon which he makes his claim support this idea. Marshall had a history of fighting for the supremacy of the Constitution and the independence of the judiciary. It is not unreasonable to deduce that Marshall was not simply writing the political coup of the century, but that he actually believed in what he was writing. He did believe that Section 13 of the 1789 Act was unconstitutional and that the power to decide that status lay with the Court. He did believe that the key to a successful democracy lay in an independent judiciary, with the power of judicial review.

It is through this context that the claim can be made that the “Revolution of 1800” was not simply limited to the electoral politics of the day. The revolution that occurred when Jefferson was elected extended to the judiciary. When Jefferson moved into the White House, Adams put Marshall on the Supreme Court bench and instigated the Judicial Revolution of 1800. Because Marshall was looking for a way to restrain Jefferson he reinforced the supremacy of the Constitution as a limit upon the government. The Republicans in office could not undo all that the Federalist administrations of Washington and Adams had accomplished if they too were all subject to the Constitution and Marshall’s watchful eye. In asserting this supremacy, Marshall created a

⁵⁷ *Ibid.*, 164

⁵⁸ *Ibid.*, 164

revolution of his own. Never before had the Court asserted its own power in the manner Marshall did in *Marbury*. Marshall revolted against the executive and legislative attempts to suppress the judiciary through its multiple legislative acts and asserted that, through its power of judicial review, the Court was an equal branch of the government.

In deciding *Marbury v. Madison* the way he did, Marshall revealed more than just a brilliant legal mind and recognition of a political opportunity to strengthen the judiciary. He demonstrated a sense of pragmatism and rationality that had been developed through the course of events during his life. Marshall's Federalist politics were no secret. Marshall had not only been influenced by leading Federalists such as George Washington, but had spent his entire political career defending Federalist policies. When he served in the Virginia House of Delegates during the Constitutional Ratification Convention, he not only advocated for Virginia to ratify the Constitution, but he emerged from the proceedings a leading Federalist. His career in national politics found him defending Federalist policies both at home and abroad. In the XYZ Affair, Marshall defended President Adams and his administration against negative French attacks and resisted the demands for bribes. When the French demanded an explanation for the negative comments Adams had made regarding the French, Marshall came to the president's defense, refusing to allow the French to demean the young United States by forcing them to explain their actions. Marshall continued to serve as the defender of the Federalist administration while in Congress, delivering a speech on the floor of the House of Representatives that defended President Adams and his policy decisions against Republican criticism over the Thomas Nash affair. Marshall's finding that *Marbury* had a right to his commission supported the Federalist intention to fill the courts with Federalist judges after the Election of 1800 put the Republicans in control of

both the Congress and Presidency. And in light of the Federalist fears that Jefferson and the Republicans were going to dismantle everything the Federalists had worked so hard to institute, Marshall was clearly aware that he was the leading Federalist in a position to truly have an influence on reigning in Jefferson's political agenda. Marshall knew, however, that simply deciding the case in favor of Marbury and directing the executive to deliver his commission would not actually reign in Jefferson. The president would simply refuse to deliver the commission, thus revealing the true weakness of the Court. If Marshall's weakness were exposed, then there would be no check on the Republican policies that could come forth.

But it is inaccurate to say that Marshall's sole motivation for deciding the case the way he does is because of his politics. Indeed Marshall did display his Federalist leanings in saying that Marbury had a right to his commission and chiding the executive for not delivering what was rightfully Marbury's. But Marshall also clearly understood the delicate relationship that was being forged between the executive and the judiciary. After the bitter election of 1800, Marshall was using his position to help bring the country back to a place of calm and unity. By deciding firmly for either the Federalist or Republican position, Marshall could have further unleashed bitter partisan attitudes. Instead, Marshall worked for unity and an effective government. This desire was manifested during the trial process: Marshall did not push Attorney General Lincoln to answer whether or not he knew for certain if Jefferson had ordered the commissions to be withheld. Marshall's own personal experience in the Executive branch as Secretary of State had taught him first-hand the necessity of respecting executive privilege. By respecting Lincoln's claim for executive privilege, Marshall revealed that his desire for a functioning government surpassed his personal political beliefs. This act of putting his

political beliefs second demonstrates that the decision in *Marbury* is more than just a political coup.

Instead of making a direct political statement for the Federalist Party, Marshall seized the opportunity to garner power for the Supreme Court. His language in the decision was not rife with bitter political claims; rather it demonstrated a cool logical approach to the decision. He based his decision in law, reason, and Constitutional clauses, not partisan ideology. In this, he revealed a practical and rational approach to the law that he had cultivated throughout his education and his legal career. In claiming the power of judicial review to make the Supreme Court an equal branch of the government, Marshall revealed the influence of William and Mary Chancellor George Wythe and the philosophers he read while in school. Montesquieu's argument in favor of separation of powers clearly influenced Marshall in his claim that it is the power of the Courts to interpret the Constitution, not the legislature or the executive. Blackstone's arguments on the hierarchy of law reinforced Marshall's belief in the supremacy of the Constitution. Alexander Pope's language and style in his *Essay on Man* helped Marshall develop his own legal writing style. In the opinion of *Marbury*, Marshall structured his argument in a very logical way: the Judiciary Act of 1789 creates a power contradictory to the Constitution. The Constitution is the supreme law of the land. Therefore, the power created by the Judiciary Act of 1789 cannot be valid. The end of Marshall's written opinion demonstrates his logical reasoning. He lays out, in one sentence, the principle he asserts in the case, stating, "Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as

well as other departments, are bound by that instrument.”⁵⁹ This type of logical structure was a skill that Marshall developed throughout his legal career, but was first introduced to during his early education.

Marshall’s legal career explains how he finds in favor of *Marbury* but also why he asserts the role and independence of the judiciary. Finding that *Marbury* had a right to his commission was not simply motivated by his Federalist politics. Marshall, throughout his career, advocated for the upholding of contracts, the honoring of debts, and the protection of private property. His central role in the British debt cases after the Revolution developed his belief in honoring contracts and debts. Marshall was a leading attorney in the plethora of British debt cases that arose subsequent to the Treaty of Paris of 1783. As such, Marshall’s view of debt was well known: debt was no different than a typical contract, meaning it too should be honored. The case of *Ware v. Hylton* demonstrates Marshall’s approach to the debt cases. Marshall invoked the Contract Clause of the Constitution, demonstrating not only his consistent belief in upholding the terms of a contract, but also reinforcing the supremacy of the Constitution. In the same way that American debtors had to uphold the terms of the contract with British merchants, Jefferson’s administration should uphold the contract with *Marbury*. The commission granted to *Marbury* was like a contract and thus, for Marshall, should be honored.

Marshall’s personal experience with the Fairfax estate—from his involvement in the land title cases, his personal holdings, and his father’s early role as Lord Fairfax’s agent—developed within him a sense that private property should be protected. The influence of the Fairfax property on Marshall—and thus on his decision in *Marbury*—is

⁵⁹ *Marbury v. Madison*

notable. Not only did he receive an early exposure to the great philosophers of the age as a result of his father's access to Fairfax's library, but Marshall's participation in the legal cases rising from the claims to title developed his skills and beliefs as a lawyer. Marshall was retained as counsel for the Fairfax estate in the case *Hite v. Fairfax*, defending the Fairfax claim to the land. From *Fairfax* he developed a cohesive argument in favor of property rights as protected by law. In *Marbury* he invoked that same argument. Marbury's commission was like property and thus should be protected. Because he was denied his property, Marshall draws the conclusion that he does indeed have some legal remedy to recover his commission.

Marshall's legal reasoning rested on the basis that the Constitution is the supreme law of the land and that the judiciary is to enforce that supreme law free of influence from either the legislative or executive branches. It is not difficult to see the influence of Marshall's life on this argument. It comes as no surprise that Marshall based his opinion on the supremacy of the Constitution and the independence of the judiciary. He spent his entire legal and political career defending these principles. His service in the Continental army during the Revolution broadened his view of the powers and strength that should be held by the central government. The Continental Congress had little authority and power to adequately provide supplies and resources to the soldiers, leading to deprivation that Marshall suffered first hand at Valley Forge. As a result, Marshall believed that the central government must have the power necessary to sufficiently provide for the military. This belief in a strong central government manifested itself in his judicial decisions through his argument for constitutional supremacy. The Constitution provided the government with its powers and rights and in order for that central government to have the necessary strength to provide for the country, no other

legislation or act could be paramount. Marshall's tenure as an officer during the Revolution therefore directly impacted the decision he wrote in *Marbury*. As a student at William and Mary, he learned about the supremacy of law from George Wythe. He repeatedly defended the supremacy of the constitution as a member of the Virginia council of state. During the Posey Affair in 1783, Marshall invoked Edmund Randolph's argument from *Commonwealth v. Canton* that the constitution represented the will of the people and should therefore be enforced over the will of the people. This experience is reflected in the language Marshall uses, stating "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."⁶⁰ Marshall fought vigorously for the ratification of the U.S. Constitution as a Federalist, and championed an independent judiciary as the defender of liberty in his arguments on the floor of the Virginia Convention. In the 1793 case *Ware v. Hylton*, Marshall argued before the Supreme Court that a federal treaty was superior to a Virginia state law because the Constitution made it paramount to state statutes. Marshall's claim of constitutional supremacy is neither outlandish nor surprising. Rather, given his consistent defense of the principle throughout his career, Marshall's landmark decision appears instead to be very understandable.

Marshall's defense of judicial review was hardly a new position for him. While on the council of state, Marshall used the opportunity presented in the Posey Affair to fight not only for the independence of the judiciary but also to declare a law invalid by contradiction of the Virginia Constitution. In his participation in the ratification debates, Marshall argued that the judiciary will be the body to guard against any legislative tyranny

⁶⁰ *Marbury v. Madison*

over the states by declaring void any legislation that is unconstitutional. Marshall reiterates that sentiment in his opinion in *Marbury*, writing “[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”⁶¹ He employs the power of judicial review to defend the Constitution. But he also argues that this was not a power he was uniquely claiming for the Court, but rather one that was “apparent, that the Framers of the constitution contemplated that instrument as a rule of the government of the courts.”⁶² Arguing for judicial review was not something that he wrote into the opinion to simply gain power for the Court in order to limit Jefferson’s administration and stage a political coup. The fact that Marshall had argued for this principle since the very creation of the Constitution demonstrates that this was a power in which he genuinely believed. That he would claim this right for the United States Supreme Court is no surprise.

Marshall’s personality and leadership is also relevant to how he shapes this decision. As an officer in the Continental army, he developed an easy, confident leadership style and was especially influenced by his tenure as adjutant to Daniel Morgan. His experiences as an officer in the Continental army developed his leadership skills and his reputation. Marshall then used those skills to lead the movement to ratify the Constitution. His influence in helping to ratify the Constitution jettisoned him to a position of prominence in the Federalist Party. His experiences in the Virginia legislature and the House of Representatives, as well as his central role in the negotiations in France, helped develop his ability to generate consensus. *Marbury v. Madison* was a unanimous decision, created so by his ability to create consensus among the justices. He broke with the traditional practice of each justice delivering an individual opinion, and

⁶¹ *Marbury v. Madison*

⁶² *Marbury v. Madison*

instead had the Court speak with one unanimous voice.⁶³ Because of these leadership roles, Marshall was able to garner respect from his political colleagues. When he handed down his decision in *Marbury* his opinion was respected. But these leadership roles also demonstrate that his decision in *Marbury* was not just a political coup. Marshall had a long record of advocating for the supremacy of the Constitution and the independence of the courts. Therefore, his decision in *Marbury* codified a power of the Court he believed it possessed already.

Marbury v. Madison was a landmark case because it fundamentally changed the judiciary. This case is the foundation of the rule of law, of logic, of representative government, and of judicial independence. By asserting the right to judicial review, Marshall cemented a power for the Court that would make it a more equal player to the other two branches. Even more vital, however, is his argument for the supremacy of the Constitution. After *Marbury*, the Constitution's place as the foundation for all other law was secured. But *Marbury* does even more than implement the doctrine of judicial review. It is a lesson in moderation: balance of politics between competing ideologies controlled by a rational and pragmatic chief justice who recognized the need for moderation.

V: In the Aftermath of *Marbury v. Madison*

When Marshall announced his opinion in 1803, many in the government and press viewed the decision more as a political coup and less as changing the very nature of the judicial branch. Marshall did not like Jefferson, but at this time the evidence suggests that both men were still trying to work for a united country. The bitter hostility that would develop between them after the Burr Treason trial in 1807 had not yet come to a

⁶³ Max Lerner, "John Marshall and the Campaign of History," *Columbia Law Review*, vol. 39, no. 3 (March 1999): 396

head. When the decision was issued, Jefferson did not comment publically or privately on the outcome, and it was not until many years later that he would express views that he was upset by the decision.⁶⁴ Marshall's attack on Congress's authority to change Supreme Court jurisdiction was not hailed as particularly partisan or controversial. In fact, most accounts of the case at the time completely ignored the claims to judicial review and instead focused on the statement in support of Marbury receiving his commission.⁶⁵

Republican press covered the decision in detail, with several papers printing the decision verbatim. The *National Intelligencer*, the *New York Spectator*, and the *Aurora* all devoted more than one issue to the case, focusing not on the lasting legal legacy of judicial review, but rather informing readers about the importance of the case while refraining from criticizing the case.⁶⁶ Federalist papers, in contrast, covered the event in much less detail. The little praise that was printed focused expectedly on the decision in favor of Marbury, not that Section 13 of the 1789 was unconstitutional.⁶⁷ After the initial decision was handed down, *Marbury* was largely ignored. Congress did not react strongly, and the Court restrained itself from overturning any legislation with which it simply did not agree.

Despite the few political waves that *Marbury* stirred in 1803, it would become the foundation for many of the later Court's monumental decisions. It can reasonably be argued, for example that without the assertion of judicial review in *Marbury v. Madison*, many of the mid-20th century civil rights issues would not have occurred. The next prominent case to bring judicial review back to the table was the 1856 case *Dred Scott v.*

⁶⁴ Smith, *John Marshall*, 324

⁶⁵ *Ibid.*, 324

⁶⁶ Nelson, *Marbury v. Madison*, 72

⁶⁷ Smith, *John Marshall*, 325

Sanford. Chief Justice Roger B. Taney invoked the power of judicial review to declare the 1820 Missouri Compromise unconstitutional, holding that the due process clause of the Fifth Amendment prevented the federal government from freeing slaves who were brought into federal territories.⁶⁸ By using judicial review to overturn the Missouri Compromise, Taney effectively prohibited the federal government from preventing the spread of slavery to the western territories and states. Without the power of judicial review that Marshall asserted in *Marbury v. Madison*, the decision in *Dred Scott v. Sanford* would never have been decided the manner in which it was cast.⁶⁹

Other landmark cases rested on the power of judicial review as well, including the majority of the 1960s civil rights cases. *Brown v. Board of Education* (1954) used the Court's authority to overturn state legislation as unconstitutional that allowed for the legal segregation of public schools for black and white children. The 1965 case *Griswold v. Connecticut* overturned a Connecticut law barring the use of contraceptives by married couples as unconstitutional by violating the right to privacy. While the subsequent abortion cases—including the 1973 case *Roe v. Wade*—were not strictly based on the power of judicial review, without that tool the Supreme Court could not have claimed the authority to find that different state statutes violated a constitutional right to privacy and were thus invalid. Even today, the power of judicial review is central to many arguments presented before the Court. Those who claim that the Second Amendment protects an individual's right to own a firearm want the Court to invoke its power of judicial review to overturn state and municipal gun control statutes as unconstitutional.

⁶⁸ *Dred Scott v. Sanford*

⁶⁹ Keith E. Whittington, *Political Foundations of Judicial Supremacy*, (Princeton: Princeton University Press, 2007), 10-11

Without the power claimed by Marshall in *Marbury v. Madison*, this argument would never exist.

Marshall's legacy does not extend just to domestic legislation and civil rights issues. It goes even further, as his argument for judicial review has spread internationally. The United States was the first modern democracy whose legislative body was checked by a judicial body.⁷⁰ Great Britain maintained the doctrine of parliamentary sovereignty and thus the doctrine of judicial review that was introduced in the United States was revolutionary. But Marshall's legacy was not to be confined to the United States. By the 1920s, nearly all of the nations who had adopted some form of judicial review were in Latin America, namely Argentina, Brazil, Columbia, Mexico, Venezuela, and the Dominican Republic.⁷¹

The end of World War I and the construction of new European constitutions in the aftermath of the war saw the first tendrils of judicial review spreading to Europe. By 1920, judicial review existed in some form in Czechoslovakia, Austria and the Weimar Republic of Germany.⁷² It was not until the end of World War II, however, that judicial review would truly sweep through Europe and the rest of the world. With America emerging as a superpower after 1945, it had a strong hand in the reconstruction of European and former Axis-power nations' constitutions. As a result, it exported the doctrine of judicial review to the rebuilding nations. Chapter VI, Article 81 of the Japanese Constitution names the Supreme Court as "the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."⁷³ The 1949 Constitution of the Federal Republic of Germany, created the independent Federal

⁷⁰ Nelson, *Marbury v. Madison*, 104

⁷¹ *Ibid.*, 104

⁷² *Ibid.*, 105

⁷³ The Constitution of Japan, Chapter VI, Article 81

Constitutional Tribunal, with the power to declare statutes null and void if they conflict with the *Grundgesetz*, the Basic Law for the Federal Republic of Germany.⁷⁴ Italy, the third member of the Axis powers, explicitly recognized the power of judicial review for acts of its national legislature; in 1956, it created a constitutional court to realize the practice of judicial review.⁷⁵

Judicial review continued to spread throughout the world as countries adopted it to protect minority rights. India adopted judicial review upon its independence from Great Britain in 1947 as a method of protecting its numerous ethnic and religious minorities from potential oppressive legislation. Canada established its own Supreme Court in the 1980s, complete with the powers of judicial review as a method of protecting minority rights, including those of the Quebecois. Two other nations adopted judicial review to protect minorities: Belgium, in the 1970s and 1980s established the Court of Arbitration to represent Flemish-speaking and French-speaking groups; and South Africa, in the era after the end of apartheid established judicial review in its highest court to protect both black and white interests.⁷⁶

Other nations began adopting judicial review for their own political interests. In 1958, France created the Fifth Republic, and created its Constitutional Court with the power to rule on an act's "conformity with the Constitution."⁷⁷ Spain's 1978 constitution re-established the power of judicial review from the 1930s; Portugal and Sweden both also adopted judicial review in the 1970s.⁷⁸ Eastern Europe has also begun adopting judicial review, especially since the fall of the Soviet Union. Czechoslovakia established a

⁷⁴ The Basic Law for the Federal Republic of Germany

⁷⁵ Nelson, *Marbury v. Madison*, 107

⁷⁶ *Ibid.*, 108-110

⁷⁷ The French Constitution of October 4, 1958, Title VII Article 61

⁷⁸ Nelson, *Marbury v. Madison*, 111

Constitutional court in 1968, and both the Czech Republic and Slovakia maintain forms of the Court today; constitutional courts with the power of judicial review were also established in the former Soviet nations of Hungary (1990), Romania (1991), Lithuania (1992), Belarus (1994), Latvia (1996), and the Ukraine (1996).⁷⁹ In 1991, even Russia established its own Constitutional Court, with the power of judicial review. It has taken an active stance towards executive actions, and has even withstood former president Boris Yeltsin's attempts to destroy it by packing the court with new judges.⁸⁰

Judicial review has spread to all corners of the world, from America to Europe, Asia to Africa, and even to Oceania. In 1985, New Zealand's deputy prime minister proposed a Bill of Rights that included the power of judicial review that was remarkably similar to Marshall's style of judicial review. There was, however, great opposition to this proposal, and ultimately the Bill of Rights was implemented with a much more limited form of judicial review.⁸¹ Whether or not New Zealand increases its powers of judicial review, or for that matter where Marshall's legacy will spread next is a question that remains to be answered.

⁷⁹ *Ibid.*, 111

⁸⁰ *Ibid.*, 112

⁸¹ *Ibid.*, 112

CHAPTER FOUR: Conclusion

Marshall's opinion in *Marbury v. Madison* was not simply a political coup. Rather it was the culmination of his beliefs and experiences that led him to decide the case the manner in which he does. By viewing the opinion through the lens of his life, it becomes obvious that Marshall was not writing a political diatribe against the opposing political administration. He was sculpting the image and authority of the Court he thought instrumental for the promotion of American democracy.

The opinion in *Marbury v. Madison* contains many levels of meaning and influence, reflecting the many areas of Marshall's life that impacted his decision. His experience in the Revolution led him to fight for a strong central government capable of supporting a military. He fulfills this need by strengthening the judiciary of the federal government. He establishes judicial review to elevate the judiciary as an equal branch of government because of his exposure to philosophers advocating for the separation of powers during his education. As a lawyer, Marshall repeatedly defended the upholding of contracts and the protection of property; as chief justice, he held that Marbury had a right to his commission because it was property. As a participant in the Ratification Convention, Marshall emerged as the leading advocate for the supremacy of the Constitution and the independence of the judiciary as the bulwark of freedom. By establishing judicial review in *Marbury*, Marshall fulfilled his argument for an independent court and cemented the Constitution as the supreme law of the land.

American democracy is unique for a number of reasons, but primary among them is the existence of judicial review. The power of the courts to subject the acts of the other branches of government to scrutiny is a structural element that was first implemented through John Marshall's pen. Though philosophers and legal scholars of

the Enlightenment had articulated the foundations of judicial review, it was not until John Marshall, in his capacity as Chief Justice, codified the theory that judicial review became a reality. Marshall's vision of an independent judiciary and undying belief in the supremacy of the Constitution over all other law led him to use *Marbury v. Madison* as a tool to implement one of the defining features of American government. For Marshall's legacy is more than just a definition of judicial review: it is the lasting success of American liberty.

Appendices

Appendix A – Article III of the Constitution of the United States

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—[between a State and Citizens of another States;—] between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Appendix B – *Marbury v. Madison* [5 U.S. (1 Cranch) 137 (1803)]

Chief Justice Marshall delivered the opinion of the Court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded. . . .

In the order in which the court has viewed this subject, the following questions have been considered and decided:

1st. Has the applicant a right to the commission he demands?

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is -- 1st. Has the applicant a right to the commission he demands? . . .

It [is] decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. . . .

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . .

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no

power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . .

It is, then, the opinion of the Court [that Marbury has a] right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on -- 1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ. . . .

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that the courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written constitution -- would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the

construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that "no bill of attainder or ex post facto law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States." Why does a Judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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